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THE HEARSAY RULE IN MISSISSIPPI: "OUT OF THE PRESENCE OF THE ADVERSE PARTY—IN THE PRESENCE OF THE ADVERSE PARTY" ..... *Thomas R. Mason & Wayne Hengen*

COMMENTS

MISSISSIPPI LAW GOVERNING PRIVATE CONSTRUCTION CONTRACTS: SOME PROBLEMS AND PROPOSALS

OPPRESSION OF MINORITY SHAREHOLDERS: A PROPOSED MODEL AND SUGGESTED REMEDIES

STANDING TO SUE UNDER SECTION 4 OF THE CLAYTON ACT: DIRECT INJURY, TARGET AREA, OR TWILIGHT ZONE

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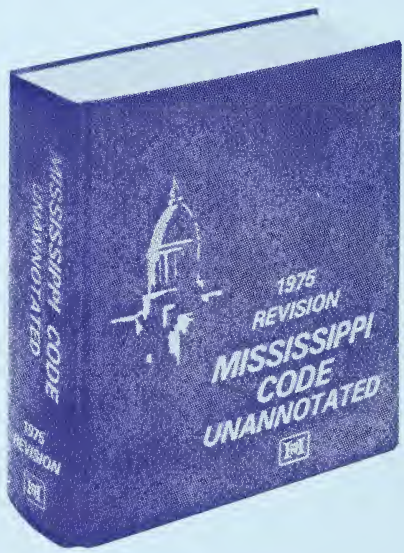

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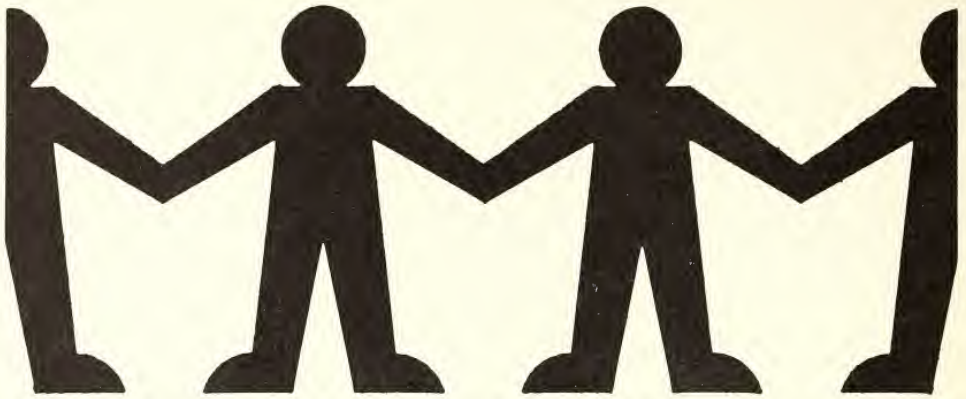

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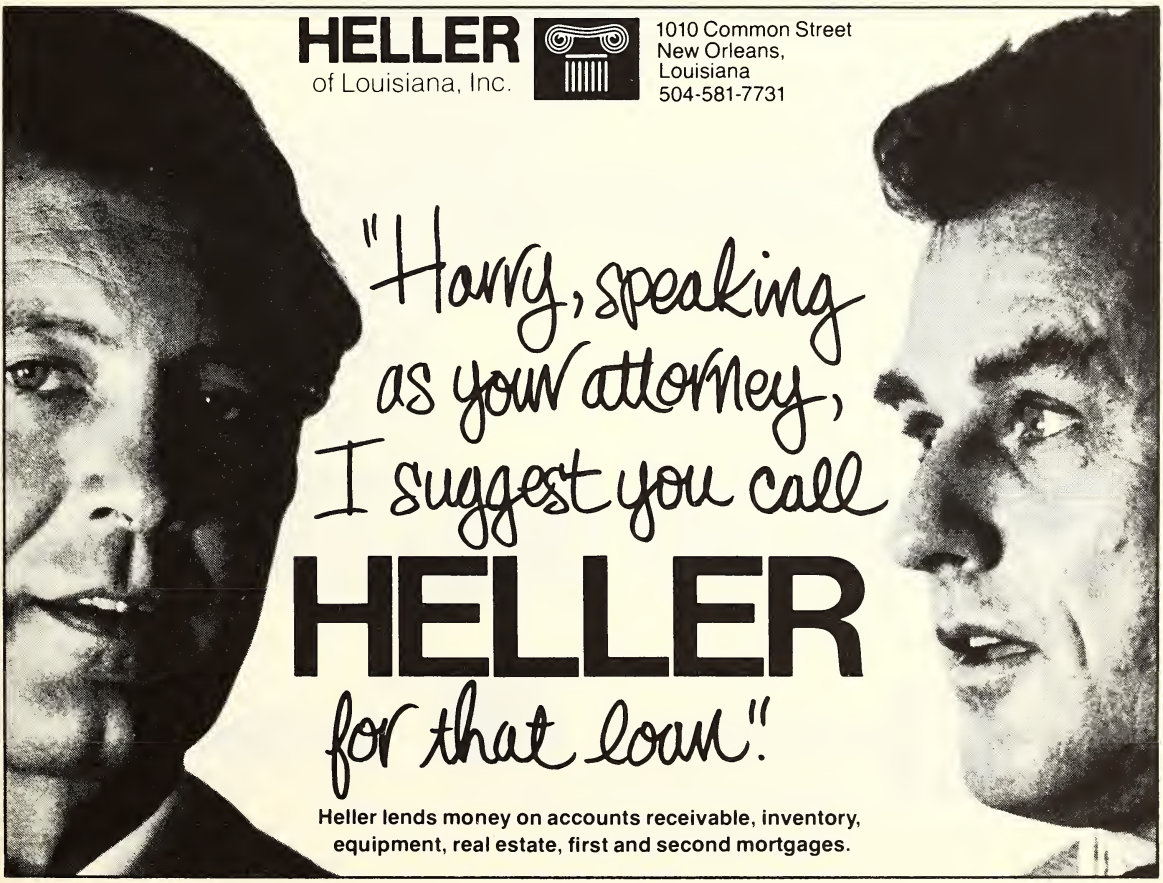

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TABLE OF CONTENTS

ARTICLES

The Speedy Trial Act of 1974 in Constitutional Perspective ..... *Vagn K. Hansen & William N. Reed* 365

The Hearsay Rule in Mississippi: "Out of the Presence of the Adverse Party—In the Presence of the Adverse Party" ..... *Thomas R. Mason & Wayne Hengen* 423

COMMENTS

Mississippi Law Governing Private Construction Contracts: Some Problems and Proposals 437

Oppression of Minority Shareholders: A Proposed Model and Suggested Remedies 476

Standing to Sue Under Section 4 of the Clayton Act: Direct Injury, Target Area, or Twilight Zone 502

Strict Liability and Allergic Drug Reactions 526

RECENT DECISIONS

Civil Rights—Equal Employment Opportunity—Statute of Limitations for Filing a Charge With the EEOC Is Not Tolled for the Period an Employee Seeks Relief Through a Company's Grievance Procedures (*Guy v. Robbins & Myers, Inc.*, 6th Cir. 1975). 545

Truth in Lending—Standing—Statutory Recovery Available Despite Absence of Actual Injury Since Statute Defines Injury in Fact (*White v. Arlen Realty & Development Corp.*, 4th Cir. 1975). 560

BOOK REVIEWS

EVIDENCE AND THE TRIAL LAWYER ..... *Thomas R. Mason* 569

JURY WOMAN ..... *Betty A. Morgan* 571

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THE SPEEDY TRIAL ACT OF 1974 IN CONSTITUTIONAL PERSPECTIVE

Vagn K. Hansen and William N. Reed***

TABLE OF CONTENTS

I. The Constitutional Guarantee 367
A. *Pre*-Barker *Development* 367
B. Barker v. Wingo: *The Balancing Process* 374
C. *Development of the Balancing Test* 378
1. Length of the Delay 378
2. Reason for the Delay 382
a. *The Investigatory Process* 385
b. *Motion Practice* 386
c. *The Accused's Competency* 387
3. Accused's Assertion of the Right 388
4. Prejudice to the Accused 391
a. *The Burden of Proof* 392
b. *Impairment of the Defense* 393
c. *Anxiety and Concern* 397
d. *Oppressive Pretrial Incarceration* 399
II. The Speedy Trial Act of 1974 400
A. *Time Limitations* 406
B. *Excludable Delays* 409
C. *Continuances* 411
D. *Accused Prisoners* 413
E. *Sanctions* 415
F. *Implementation* 418
Conclusion 421

On July 1, 1976, the federal criminal justice system will commence a phased implementation of procedural guarantees embodied in the Speedy Trial Act of 1974.[1] The Act signifies an initial congressional attempt to remedy the "intolerable delays in our system of administering criminal justice."[2] While the avowed purpose is "to assist in reduc-

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[1] 18 U.S.C.A. §§ 3161 *et seq.* (Supp. 1976).

[2] *Hearings on S.895 Before the Subcomm. on Constitutional Rights of the Senate*

ing crime and the danger of recidivism by requiring speedy trials and by stengthening the supervision over persons released pending trial,"[3] the value of the Act will be determined, ultimately, by its impact on the sixth amendment right to a speedy trial.[4]

Although the Supreme Court has eschewed quantifying the constitutional guarantee into a specific number of days,[5] the Act mandates strict time limits for all stages of the federal criminal proceeding.[6] Presumably, the longest permissible delay under the Act cannot surpass the shortest impermissible delay under constitutional standards. As a consequence, when determining a defendant's rights under the Act, courts will continue to be concerned with the nature of the sixth amendment guarantee. Indeed, the Act specifically states that "[n]o provision of this chapter shall be interpreted as a bar to any claim or denial of speedy trial as required by amendment VI of the Constitution."[7]

The authors believe that the right to a speedy trial has suffered from benign neglect and that judicially promulgated rules of procedure[8] have done little to remedy the plight of those facing criminal charges. Despite the pleas of numerous writers[9] and the American Bar Association,[10] speedy trial legislation has been mired in Congress since 1970. As a result, and with little guidance from the Supreme Court,[11] the contours

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Comm. on the Judiciary, 92d Cong., 1st Sess. 96 (1971) (statement of then Assistant Attorney General William H. Rehnquist).

[3] H.R. REP. No. 1508, 93d Cong., 2d Sess. 8 (1974).

[4] U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ."

[5] Barker v. Wingo, 407 U.S. 514, 523 (1972). *See also* Godbold, *Speedy Trial—Major Surgery for National Ill*, 24 ALA. L. REV. 265, 276 (1972).

[6] 18 U.S.C.A. § 3161(a)-(g) (Supp. 1976).

[7] *Id.* § 3173.

[8] *E.g.*, FED. R. CRIM. P. 48(b) provides:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

[9] *See, e.g.*, Note, *Speedy Trial: A Constitutional Right in Search of Definition*, 61 GEO. L.J. 657 (1972); Note, *The Lagging Right to Speedy Trial*, 51 VA. L. REV. 1587 (1965).

[10] AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL (Approved Draft, 1968).

[11] The Court has considered the sixth amendment speedy trial guarantee on twelve occasions: Dillingham v. United States, 96 S. Ct. 303 (1975) (per curiam); Moore v. Arizona, 414 U.S. 25 (1973); Strunk v. United States, 412 U.S. 434 (1972); Barker v. Wingo, 407 U.S. 514 (1972); United States v. Marion, 404 U.S. 307 (1971); Dickey v. Florida, 398 U.S. 30 (1970); Smith v. Hooey, 393 U.S. 374 (1969); Harrison v. United States, 392 U.S. 219, 221-22 n.4 (1968); Klopfer v. North Carolina, 386 U.S. 213 (1967); United States v. Ewell, 383 U.S. 116 (1966); Pollard v. United States, 352 U.S. 354 (1957); Beavers v. Haubert, 198 U.S. 77 (1905).

of the speedy trial right have been shaped by the federal circuit courts of appeals. Section I of this article will trace the decisions of the Supreme Court but will deal primarily with the case law as it has developed in the circuit courts of appeals. Particular emphasis will be accorded the factors enunciated in *Barker v. Wingo*[12] and the inconsistencies and injustices that have arisen from its interpretation.

Section II will explore the legislative history of the Speedy Trial Act and explain its provisions as they relate to time limitations, acceptable reasons for delay, and sanctions for violation and obstruction. The courts have, of course, not yet had an opportunity to apply the Act; however, by relating its provisions to concepts spawned by the courts' construal of the sixth amendment speedy trial right, specific suggestions may be proffered as necessary to ensure effective application of the Act's provisions. Finally, Section II will point out problems which may arise through implementation of the Act, discuss its impact on the criminal justice system, and identify vital supplemental measures.

I. The Constitutional Guarantee

A. *Pre*-Barker *Development*

The right to a speedy trial was apparently articulated for the first time in the Magna Carta of 1215: "To no one will we sell, to none will we deny or delay, right or justice";[13] however, language in the Assize of Clarendon of 1166[14] evidenced identification of the right at an earlier stage of the English law. The Habeas Corpus Act, passed by Parliament in 1679,[15] required that

> if any person or persons shall be committed for high treason or felony plainly and specially expressed in the warrant of committment upon his prayer or petition . . . to be brought to his trial shall not be indicted sometime in the next term . . . after such committment it shall and may be lawful to and for the judges . . . and justices . . . and they are hereby required upon motion to them made in open court the last day

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[12] 407 U.S. 514, 530 (1972).

[13] S. Baxter, Basic Documents of English History 27 (1968).

[14] 4. And when a robber or murderer or thief or receiver of them has been arrested through the aforesaid oath, if the justices are not about to come speedily enough into the county where they have been taken, let the sheriffs send word to the nearest justice by some well-informed person that they have arrested such men, and the justices shall send back word to the sheriffs informing them when they desire the men to be brought before them; and let the sheriffs bring them before the justices.

Id. at 19.

[15] *Id.* at 150.

> of the term sessions or goal-delivery either by the prisoner or any one in his behalf to set at liberty the prisoner upon bail unless it appear . . . upon oath made that the witnesses for the King could not be produced the same term sessions or general goal-delivery.[16]

Security of the right was so deeply engrained in our English heritage, many Americans felt it unnecessary to include a similar provision in the Bill of Rights.[17] To be certain, however, the right to a speedy trial was included in the sixth amendment. Since that time, every state has guaranteed this right to its citizens through statutory[18] or constitutional[19] provision.

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[16] *Id.* at 151.

[17] *See* THE FEDERALIST No. 84, at 533 (H. Lodge ed. 1888) (A. Hamilton).

[18] ALA. CODE tit. 13, § 330 (1959); ALAS. STATS. ANN. tit. 12, § 12.20.050 (1962); ARIZ. R. CRIM. P. 8.1-.6 (Cum. Supp. 1975-1976); ARK. STAT. ANN. §§ 43-1708 to -1710 (Repl. Vol. 1964); CAL. PENAL CODE § 1382 (West Supp. 1975); COLO. REV. STAT. ANN. § 40-1-505 (Perm. Cum. Supp. 1971); CONN. STATS. ANN. § 54-139(a) (Cum. Supp. 1975); DEL. CODE ANN. tit. 10, § 6910 (1974); FLA. R. CRIM. P. 3.191 (West 1973); GA. CODE ANN. §§ 27-1901, -1902, -2002 (1972); HAWAII REV. STATS. tit. 37, § 711-6 (1968); IDAHO CODE ANN. §§ 19-3501 to -3506 (1948); ILL. ANN. STAT. ch. 38, § 103-5 (Smith-Hurd 1970); IND. R. CRIM. P. 4 (Supp. 1975); IOWA CODE ANN. §§ 795.1 -.3 (Supp. 1975-1976); KAN. STAT. ANN. §§ 62-1431 to -1433 (1964); KY. R. CRIM. P. 9.02,-.04 (1970); LA. CODE CRIM. PRO. ANN. art. 578 to -82 (West 1967); ME. REV. STAT. ANN. tit. 15, § 1201 (1964); MD. ANN. CODE art. 27, § 591 (Cum. Supp. 1975); MASS. ANN. LAWS ch. 277, §§ 72, 73 (1972); MICH. COMP. LAWS ANN. § 767.38 (1968); MINN. R. CRIM. P. 30.02 (1975); MISS. CODE ANN. § 99-17-1 (1972); MO. ANN. STAT. §§ 545.890, -.90 (Vernon 1953); MONT. REV. CODES ANN. § 95-1703 (Supp. 1975); NEB. REV. STAT. §§ 29-1201 to -1204 (1965); NEV. REV. STAT. § 178.556 (1973); N.J. RULES REV. §§ 3:25-1 to -3 (1973); N.Y. CRIM. PRO. LAW §§ 30.20, -.30 (McKinney Cum. Supp. 1975-1976); N.C. GEN. STAT. § 15-10 (Repl. Vol. 1975); N.D.R. CRIM. P. 48 (Repl. Vol. 1974); OHIO REV. CODE ANN. §§ 2945.71 to -.73 (Anderson 1975); OKLA. STAT. ANN. tit. 22, §§ 811 to -19 (1969); ORE. REV. STAT. §§ 135.745 to -.765 (1973); PA. STAT. ANN. tit. 19, § 781 (1964); R.I. GEN. LAWS ANN. §§ 12-13-6, -7 (Supp. 1975); S.C. CODE ANN. § 17-509 (1962); S.D. COMPILED LAWS ANN. §§ 22-34-1 to -6 (1967); TENN. CODE ANN. §§ 40-2001, -2102 (1975); TEX. CODE CRIM. PRO. ANN. art. 32.01 (1966); UTAH CODE ANN. §§ 77-51-1 to -6 (1953); VT. R. CRIM. P. 48(b) (1) (1974); VA. CODE ANN. §§ 19.1-190, -191 (Cum. Supp. 1975); W. VA. CODE ANN. § 62-3-1 (Cum. Supp. 1975); WIS. STAT. ANN. § 971.10 (Cum. Supp. 1975-1976); WYO. STAT. ANN. §§ 7-234 to -236 (1959).

Neither state statutory nor decisional law are within the scope of this article; however, the speedy trial clause is applicable to the states through the fourteenth amendment. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967). An analysis of federal cases will, therefore, entail consideration of standards binding on the states.

[19] ALA. CONST. art. I, § 6; ALAS. CONST. art. I, § 11; ARIZ. CONST. art. II, § 24; ARK. CONST. art. II, § 10; CAL. CONST. art. I, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 16; GA. CONST. art. I, ch. 2-105; HAWAII CONST. art. I, § 11; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 8; IND. CONST. art. I, § 12; IOWA CONST. art. I, § 10; KAN. CONST. art. I, § 18; KY. CONST. § 11; LA. CONST. art. I, § 9 (1921); ME. CONST. art. I, § 6; MD. CONST. art. 21; MASS. CONST. pt. I, art. II; MICH. CONST. art. I, § 20 (1963); MINN. CONST. art. I, § 6 (1857); MISS. CONST. art. III, § 26; MO.

The trail toward an understanding of the sixth amendment guarantee through Supreme Court decisional law has indeed been a tortured one. While the Court has declared the right to be "one of the most basic . . . preserved by our Constitution,"[20] it has remained surprisingly content to pass over recurring problem areas. As recently as 1970, the Court's failure to provide definitive guidelines prompted Mr. Justice Brennan to note that "many—if not most—of the basic questions about the scope and context of the speedy-trial guarantee remain to be resolved."[21]

The foundation laid by the Court in *Beavers v. Haubert*[22] in 1905 perhaps deserves much of the blame for existing inconsistencies. In *Beavers*, Mr. Justice McKenna recognized that "[u]ndoubtedly a defendant is entitled to a speedy trial,"[23] but concluded that

> [t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.[24]

Not until 1957 did the Court again address the speedy trial issue.

In *Pollard v. United States*,[25] petitioner asserted a violation of his right to a speedy trial by what can only be termed a "comedy of errors" at the trial level. Pollard pleaded guilty to embezzlement on September 8, 1952, but sentencing was postponed until October 3, 1952. On that date, the district judge advised petitioner to continue his rehabilitative efforts but neglected to impose a sentence.[26] Later in the day, after

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CONST. art. I, § 18(a); MONT. CONST. art. III, § 16; NEB. CONST. art. I, § 11; N.H. CONST. pt. I, art. 14; N.J. CONST. art. I, § 10; N.M. CONST. art. II, § 14 (*as amended* 1924); N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 13; OHIO CONST. art. 1, § 10; OKLA. CONST. art. II, § 6; ORE. CONST. art. I, § 10; PA. CONST. art. I, § 9; R.I. CONST. art. I, § 10; S.C. CONST. art. I, § 15 (1895); S.D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. I, art. 10 (1777); VA. CONST. art. I, § 8; WASH. CONST. art. I, § 10; W. VA. CONST. art. 3, § 14; WIS. CONST. art. I, § 7; WYO. CONST. art. I, § 10. Nevada and New York are the only states that do not secure the right to a speedy trial through their constitutions.

[20] Klopfer v. North Carolina, 386 U.S. 213, 226 (1967), *noted in* 34 BROOKLYN L. REV. 316 (1968); 46 N.C.L. REV. 387 (1968); 19 S.C.L. REV. 470 (1967); 19 SYRACUSE L. REV. 138 (1967).

[21] Dickey v. Florida, 398 U.S. 30, 56 (1970) (Brennan, J., concurring); *see* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL 2 (Approved Draft, 1968) ("[T]he precise boundaries of the speedy trial guarantee are far from clear.").

[22] 198 U.S. 77 (1905).

[23] *Id.* at 86.

[24] *Id.* at 87.

[25] 352 U.S. 354 (1957).

[26] *Id.* at 355. Petitioner was already serving a sentence in state prison at the time he

petitioner had departed from the courtroom, the judge imposed a 3-year probationary period.[27] Nearly 2 years later, Pollard was sentenced by the same judge to 2 years imprisonment for violating the terms of his parole.[28] Without deciding whether sentencing constituted a part of the trial for speedy trial purposes, the Court ruled that under the circumstances there was no constitutional deprivation in the absence of "purposeful or oppressive" delay.[29]

The specific interests protected by the sixth amendment guarantee were identified by the Court in *United States v. Ewell*.[30] Writing for the majority, Mr. Justice White declined to recognize a constitutional infirmity in the passage of time alone[31] but stipulated a trilogy of interests guarded by the right to speedy trial:

> This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.[32]

The Court reaffirmed the earlier *Pollard* requirement that an unconstitutional delay in trial be "purposeful or oppressive"[33] and essentially saddled the appellees with a burden of proving that the delay caused actual prejudice to their defense.[34]

The sixth amendment guarantee was applied to the states through

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appeared for sentencing. His records indicated an interest in Alcoholics Anonymous and the trial judge urged petitioner to join upon his release from prison. *Id.*

[27] The judgment and order were concededly invalid under Rule 43 of the Federal Rules of Criminal Procedure which provides in pertinent part:

> The defendant shall be present at the arraignment . . . at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence . . . .

[28] 352 U.S. at 356-57.

[29] *Id.* at 361. The Court observed "that petitioner made no motion to secure a prompt proper sentence," but failed to illuminate the effect thereof. *Id.* at 362 n.8.

[30] 383 U.S. 116 (1966), *noted in* 52 A.B.A.J. 375 (1966); 54 GEO. L.J. 1428 (1966); 18 SYRACUSE L. REV. 110 (1966). Clarence Ewell and Ronald Dennis were indicted and subsequently found guilty of selling narcotics. Both convictions were vacated because of defects in the original indictments, but the government sought and obtained superseding indictments. Based on the appellees' contention that the passage of over 19 months from the original indictments violated their rights to a speedy trial, the district court dismissed the new indictments. 383 U.S. at 118-19.

[31] 383 U.S. at 120.

[32] *Id.*

[33] *Id.* The majority apparently found no such conduct on the part of the government.

[34] "[The appellees] mention no specific evidence which has actually disappeared or has been lost, no witnesses who are known to have disappeared." *Id.* at 122. While Mr. Justice Brennan agreed the absence of prejudice mandated reversal, he refused to "imply approval of the tactics the Government employed." *Id.* at 126 (Brennan, J., concurring).

the fourteenth amendment in *Klopfer v. North Carolina*.[35] In *Klopfer*, some 18 months after indictment, the state was permitted to enter a nolle prosequi with leave order, without justification and contrary to petitioner's objection and demand for speedy trial.[36] The effect of the order was to discharge petitioner from custody but not to discharge the indictment.[37] In reversing the North Carolina Supreme Court's finding that the order did not deprive petitioner of his right to a speedy trial, the Court noted the prejudicial effects emanating from the state's actions.

> The pendency of the indictment *may* subject [petitioner] to public scorn and deprive him of employment, and *almost certainly* will force curtailment of his speech, associations and participation in unpopular causes.[38]

The speculative language employed by the Court is arguably inconsistent with *Ewell*. No mention was made of any proof offered to show that Klopfer was "deprived of employment" or forced to curtail "his speech, associations and participation in unpopular causes." In *Ewell*, the Court refused to find that petitioner suffered any prejudice to his defense in the absence of "specific evidence."[39] Thus, at this juncture, it was far from clear whether a defendant was required to prove actual prejudice to his defense resulting from delay, or whether, under certain circumstances, personal prejudice, such as anxiety and concern, would suffice to merit dismissal.[40]

Perhaps the most troublesome area in the law of speedy trials concerns the rights of persons indicted in one jurisdiction but incarcerated for other crimes in another jurisdiction.[41] The Court's seminal consideration of this problem arose in *Smith v. Hooey*.[42] In *Smith*, petitioner was indicted for theft while serving a sentence in a federal penitentiary. During the next 7 years, despite petitioner's repeated demands to be

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[35] 386 U.S. 213, 222-23 (1967). Mr. Justice Harlan's concurrence objected to incorporation of the sixth amendment right into the fourteenth amendment. *Id.* at 226. Harlan remained steadfast in his discontent with the majority rule. Dickey v. Florida, 398 U.S. 30, 38-39 (1970) (Harlan, J., concurring); Smith v. Hooey, 393 U.S. 374, 383 (1969) (Harlan, J., separate opinion).

[36] 386 U.S. at 218.

[37] *Id.* at 219.

[38] *Id.* at 222 (emphasis added).

[39] 383 U.S. at 122.

[40] *See* Godbold, *supra* note 5, at 269.

[41] For an excellent discussion of this topic, see Yackle, *Taking Stock of Detainer Statutes*, 8 LOYOLA-L.A.L. REV. 88 (1975).

[42] 393 U.S. 374 (1969), *noted in* 55 A.B.A.J. 362 (1969); 49 NEB. L. REV. 166 (1969); 47 TEX. L. REV. 1210 (1969).

brought to trial,[43] state officials failed to initiate any action to secure his presence. Noting that the *Ewell* "demands are both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction,"[44] the Court rejected a contention that the state was absolved of any duty under the sixth amendment.[45] Rather, the Court established that where an indictee is incarcerated in another jurisdiction and demands trial, the state has a "constitutional duty to make a diligent, good-faith effort to bring him" to trial.[46] In propounding this rule, the Court did not decide whether a defendant in petitioner's posture was required to prove prejudice. That very point was subsequently addressed by the Court in *Dickey v. Florida*,[47] although a clear resolution of the question was not achieved.

The facts in *Dickey* were similar to those confronting the Court in *Smith*. On June 28, 1960, Dickey was taken into custody by federal authorities on bank robbery charges. On July 1, 1960, local officials in Marianna, Florida, issued an arrest warrant charging him with armed robbery.[48] After Dickey was convicted on the federal charges and removed to a federal penitentiary, he initiated numerous legal proceedings intended to either secure a trial or require dismissal of the detainer lodged against him by Florida officials.[49] Following a delay of over 7 years, Dickey was tried and convicted in state court on February 13, 1968.[50] In reversing the conviction and remanding for dismissal of all

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[43] Soon after the 1960 indictment was returned, petitioner wrote the state court requesting a speedy trial. During the next 6 years, the petitioner's pleas to be tried fell on deaf ears. In 1967, after the state court failed to act on a motion to dismiss for want of prosecution, petitioner initiated a proceeding in which the Supreme Court of Texas refused mandamus. 393 U.S. at 375.

[44] *Id.* at 378. While the Court referred to the interests noted in *Ewell*, they articulated several additional examples of prejudice peculiar to incarcerated defendants. Not only can they lose the opportunity of receiving a concurrent sentence, but both the duration and conditions of their present imprisonment may be adversely affected. *Id.* Also, confined defendants' "ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired." *Id.* at 379-80.

[45] *Id.* at 377.

[46] *Id.* at 383; *see* Note, *The Lagging Right to a Speedy Trial, supra* note 9, at 1067. It is incredible that the Court refused to dismiss the indictment. Even though the Court had never before ruled on the particular question, there is little doubt that petitioner was in fact denied his sixth amendment right to a speedy trial.

[47] 398 U.S. 30, 37 (1970), *noted in* 56 A.B.A.J. 889 (1970); 25 U. MIAMI L. REV. 330 (1971).

[48] 398 U.S. at 32. The warrant issued when the victim of the alleged robbery identified Dickey as the perpetrator. *Id.*

[49] *Id.* at 32-34.

[50] *Id.* at 35. The fact that Dickey received a sentence concurrent with his federal sentence negatived the potential prejudice addressed in *Smith*. See text accompanying note 44 *supra*.

charges, the Court identified two crucial elements which coalesced to deprive petitioner of his sixth amendment right. Conceding that "[c]rowded dockets, the lack of judges or lawyers, and other factors [made] some delays inevitable,"[51] the Court found the delays before them "exclusively for the convenience of the State."[52] Moreover, the record reflected "abundant evidence of actual prejudice to petitioner in the death of two potential witnesses, unavailability of another, and the loss of police records."[53] The Court's finding of such "abundant evidence" is, however, at least questionable. No proof was tendered at trial[54] establishing the impact or relevance of the witnesses' testimony or that they would have been available had the proceedings commenced on an earlier date. Further, the loss of records obviously could have prejudiced the prosecution to a comparable degree.[55] It cannot, therefore, confidently be presumed that the Court imposed a burden on Dickey to prove actual prejudice to his defense.[56]

The final chapter of pre-*Barker* case law was written in *United States v. Marion*.[57] In what has proven to be a much debated ruling,[58] the Court held that "the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused.' "[59] While previous cases involved postindictment delays, the

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[51] 398 U.S. at 38; *see* Henn, *Speedy Trial—No "Mere Ceremonial,"* 21 CLEV. ST. L. REV. 147, 159-60 (1972); Comment, *Speedy Trials and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases*, 71 COLUM. L. REV. 1059, 1060 (1971).

[52] 398 U.S. at 38. The emphasis placed on this factor abrogates the rule announced in *Pollard* and reaffirmed in *Ewell*: that unconstitutional delay must be "purposeful or oppressive." See notes 30 & 33 *supra*.

[53] 398 U.S. at 38.

[54] The death of one witness, Dickey's sister, was alleged in a motion to quash the indictment filed the day before trial was to begin. *Id.* at 35 n.5. The unavailability of another alibi witness was asserted in two pretrial motions for continuance. *Id.* at 35 n.6.

[55] The notes were made by a deputy sheriff who had investigated the crime and had interviewed the eyewitness identifying Dickey. *Id.* at 35-36.

[56] In Moore v. Arizona, 414 U.S. 25 (1973) (per curiam), the Court reversed an Arizona Supreme Court ruling that under *Dickey* and *Barker* "a showing of prejudice to the defense at trial [is] essential to establish a federal speedy trial claim." *Id.* at 25. In doing so, however, the Court found only that *Barker* rejected such an argument. *Id.* at 26.

[57] 404 U.S. 307 (1971), *noted in* 58 A.B.A.J. 293 (1972).

[58] *See, e.g.*, Steinberg, *Right to Speedy Trial: Maintaining a Proper Balance Between the Interests of Society and the Rights of the Accused*, 4 U.C.L.A.-ALAS. L. REV. 242, 254-59 (1974); Comment, *The Speedy Trial Guarantee: Criteria and Confusion in Interpreting Its Violation*, 22 DEPAUL L. REV. 839, 857-65 (1973).

[59] 404 U.S. at 313. The finding was obviously based on an interpretation of language within the sixth amendment. See note 4 *supra*. *But see* Dickey v. Florida, 398 U.S. 30, 43-47 (1969) (Brennan, J., concurring) (reasoning that to allow full realization, the speedy trial guarantee must be applied to any delay after the state decides to prosecute); Note, *The Lagging Right to a Speedy Trial*, *supra* note 9, at 1613.

Court acknowledged that prejudice suffered from a postarrest delay could trigger the constitutional inquiry.[60] The Court's refusal to extend the sixth amendment's protective veil to the prearrest period was predicated on the question of prejudice: Marion failed to allege or prove any specific prejudice, and the Court deemed the statute of limitations sufficient protection against "the mere possibility that preaccusation delays will prejudice the defense."[61] An additional degree of protection was found to exist in the due process clause, but only when the delay "caused substantial prejudice to [the accused's] rights to a fair trial and . . . was an intentional device to gain tactical advantage over" him.[62] Recognizing that such a decision would involve a "delicate judgment based on the circumstances of each case,"[63] the Court declined, however, to resolve under what circumstances the due process guarantee would mandate dismissal.

B. Barker v. Wingo: *The Balancing Process*

The preceding section evidences that during the 67 years following *Beavers v. Haubert*, the Supreme Court provided scant guidance to the federal courts and states concerning the sixth amendment right to a speedy trial. Finally, in *Barker v. Wingo*,[64] the Court "attempted to set out the criteria by which the speedy trial right [was] to be judged."[65]

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[60] Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

404 U.S. at 320. The Court recently reasserted this conclusion in Dillingham v. United States, 96 S. Ct. 303 (1975) (per curiam).

[61] 404 U.S. at 323. *But see* Dickey v. Florida, 398 U.S. 30, 47 (1969) (Brennan, J., concurring). The *Marion* decision further recognized that an extension of sixth amendment rights to prearrest situations would cause certain procedural problems. 404 U.S. at 321 n.13.

[62] 404 U.S. at 324.

[63] *Id.* at 325. While Mr. Justices Douglas, Brennan, and Marshall apparently concurred in the result because appellees demonstrated no actual prejudice, they found the right to a speedy trial "as relevant to pre-indictment delays as it is to post-indictment delays." *Id.* at 328 (Douglas, J., concurring). The concurring Justices relied on *Dickey* as an example of inordinate preindictment delay demanding constitutional protection. *Id.* at 333. The analogy is specious because in *Dickey* the statute of limitations was tolled when the arrest warrant issued, leaving the defendant unprotected save the constitutional guarantee. Dickey v. Florida, 398 U.S. 30, 32 n.3 (1970).

[64] 407 U.S. 514 (1972), *noted in* 58 A.B.A.J. 1095 (1972); 58 CORNELL L. REV. 399 (1973); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 164 (1972); 18 N.Y.L.F. 997 (1973); 40 TENN. L. REV. 104 (1972); 26 VAND. L. REV. 171 (1973); 8 WAKE FOREST L. REV. 580 (1972). For a more recent analysis of *Barker*, see Rudstein, *The Right to a Speedy Trial:* Barker v. Wingo *in the Lower Courts*, 1975 U. ILL. L.F. 11.

[65] 407 U.S. at 516.

The petitioner, Willie Barker, and Silas Manning were arrested and subsequently indicted for murder on September 15, 1958. Admittedly, the case against Manning was the stronger, and in a bid to secure his testimony against Barker, the state brought Manning to trial first.[66] Prosecution of Manning proved to be a procedural quagmire,[67] compelling the state to obtain 16 continuances of Barker's trial. The first 11 continuances were granted without objection from Barker who had since been released on bail.[68] The state's request on February 12, 1961, for a twelfth continuance prompted Barker to move, albeit unsuccessfully, for dismissal of the indictment.[69] After four additional continuances, only one of which Barker objected to,[70] the trial was set for October 9, 1963. Despite a contention that his right to a speedy trial had been violated, Barker was convicted and sentenced to life imprisonment.[71]

Writing for the Court, Mr. Justice Powell announced that "[t]he right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused."[72] He denominated three factors leading to this conclusion: (1) a strong societal interest in achieving speedy trials;[73] (2) the possibility of delay working in favor of the defendant;[74] and (3) vagueness of the speedy trial concept.[75] Before setting forth the Court's findings, Justice Powell dis-

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[66] *Id.*

[67] A total of six trials were required to convict Manning of the two murders. Two resulted in convictions, only to be reversed on appeal, while two others resulted in hung juries. *Id.* at 516-17.

[68] At the time of his release, Barker had been confined for 10 months. During the entire period he was represented by counsel. *Id.* at 517.

[69] *Id.*

[70] Surprisingly, Barker objected to perhaps the only legitimate delay of the entire period—the illness of an ex-sheriff who investigated the case. *Id.* at 517-18.

[71] *Id.* at 518. After his conviction, Barker petitioned the Federal District Court for the Western District of Kentucky for a writ of habeas corpus. The court's rejection of the petition was affirmed by the United States Court of Appeals for the Sixth Circuit. *Id.*

[72] *Id.* at 519.

[73] The Court gave several reasons for society's interest in the speedy determination of criminal cases: (1) clogged dockets present defendants a better opportunity to negotiate over sentencing; (2) commission of other crimes by a defendant free on bail; (3) an increased temptation to the defendant to jump bail and escape; (4) debilitative effect of delay on rehabilitation; (5) prolonged confinement contributing to the poor condition of penal institutions; (6) the cost of detention; and (7) the cost of supporting the family of an imprisoned defendant. *Id.* at 519-21.

[74] *Id.* at 521.

[75] *Id.* "The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived." *Id.* at 522. In one of two cases since *Barker*, the Court reaffirmed the principle that dismissal is "the only possible remedy" where the right to speedy trial is abridged. Strunk v. United States, 412 U.S. 434, 440 (1973). This particular mandate has fueled a great deal of commentary

posed of two recurring, yet troublesome contentions. The first advocated that the sixth amendment mandated trial within a specific time frame. Allowing that "such a result would require [the] Court to engage in legislative or rulemaking activity,"[76] Justice Powell found "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months."[77] Prior to *Barker*, the "demand-waiver" doctrine, although frequently assailed as unsound,[78] enjoyed near unanimous acceptance within the federal court system.[79] Under this rule, a defendant was deemed to waive consideration of his sixth amendment right in the absence of a demand for trial.[80] The Court rejected this inflexible approach and established the assertion or non-assertion of the right to a speedy trial as merely one of several factors to consider in speedy trial analysis.[81]

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in the law journals. *Compare* Comment, *supra* note 51, at 1073-74 (1971) *and* Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 535-38 (1975), *with* 57 CORNELL L. REV. 794, 811-13 (1972).

[76] 407 U.S. at 523.

[77] *Id.* The American Bar Association, however, advocates expression of the right "by rule or statute in terms of days or months running from a specified event." AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL § 2.1 (Approved Draft, 1968). Several states couch the right in terms of a specific period of time. *E.g.*, CAL. PENAL CODE § 1382 (West Supp. 1975) (trial within 60 days of information); ILL. REV. STAT. ch. 38, § 103-5(a) (Smith-Hurd 1970) (trial within 120 days of arrest); MASS. ANN. LAWS ch. 277, § 72 (1972) (trial within 6 months of imprisonment or bail).

[78] *E.g.*, Godbold, *supra* note 5, at 278.

[79] *See, e.g.*, United States v. DeMasi, 445 F.2d 251, 256 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971); United States v. Perez, 398 F.2d 658, 661 (7th Cir. 1968), *cert. denied*, 393 U.S. 1080 (1969); Bruce v. United States, 351 F.2d 318, 320 (5th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966); Smith v. United States, 331 F.2d 784, 787 (D.C. Cir. 1964); United States v. Hill, 310 F.2d 601, 603 (4th Cir. 1962); Collins v. United States, 157 F.2d 409, 410 (9th Cir. 1946); Pietch v. United States, 110 F.2d 817, 819 (10th Cir.), *cert. denied*, 310 U.S. 648 (1940); Phillips v. United States, 210 F. 259, 262 (8th Cir. 1912).

[80] For a general discussion of the rule, see Cohen, *Speedy Trial for Convicts: A Reexamination of the Demand Rule*, 3 VAL. U.L. REV. 197 (1969); Comment, *Waiver of the Right to a Speedy Trial*, 5 CALIF. W.L. REV. 76 (1968). Mr. Justice Brennan had previously expressed dissatisfaction with the doctrine in Dickey v. Florida, 398 U.S. 30, 49-50 (1969) (Brennan, J., concurring).

[81] 407 U.S. at 528. The Court's logic has not gone without criticism. *See, e.g.*, Amsterdam, *supra* note 75, at 540:

> [T]he demand rule was never designed to identify "one factor" pertinent to the timeliness of trial. Its purpose was to compel the defendant to go on record with a request for a speedy trial while it was still possible for the trial court to give him one . . . . To convert a rule having this function into a factor for consideration among many factors in determining whether and when the right to speedy trial has been denied is equivalent to repealing the law requiring motorists to drive on the right-hand side of the road and decreeing instead that, in tort suits

In discarding the aforementioned approaches, the Court adopted a "balancing test, in which the conduct of both the prosecution and the defendant" were to be weighed.[82] Four factors were detailed by the Court as germane to the admittedly ad hoc approach: (1) length of the delay;[83] (2) reasons for the delay;[84] (3) defendant's assertion of his right;[85] and (4) prejudice to defendant.[86] The Court emphasized that the four components were wholly interrelated.

> We regard none of the four factors identified . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.[87]

Applying the virgin test, the Court determined that Barker was not deprived of his right to a speedy trial. Although characterizing the 5-year delay as "extraordinary"[88] and crediting most of the delay to the state,[89] the majority found only minimal prejudice.[90] The key factor, however, was the Court's determination that "Barker did not want a speedy trial."[91] Justice Powell reasoned that the absence of objection to the numerous continuances was a tactical measure employed by Barker

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following motor vehicle accidents, it shall be a "factor" relevant to the defendant's liability whether he was driving on the right or left.

[82] 407 U.S. at 530.

[83] "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors . . . ." *Id.*

[84] The Court delineated reasons for delay into three categories: (1) deliberate delay to "hamper the defense"; (2) "[a] more neutral reason such as negligence or overcrowded courts"; and (3) "a valid reason such as a missing witness." *Id.* at 531.

[85] The Court emphasized "that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532.

[86] "Prejudice . . . should be assessed in the light of the interests of the defendants which the speedy trial right was designed to protect." *Id.* These interests were identified in United States v. Ewell, 383 U.S. 116, 120 (1966).

[87] 407 U.S. at 533. Mr. Justice Brennan had previously suggested a set of factors similar to those recognized here. Dickey v. Florida, 398 U.S. 30, 48 (1969) (Brennan, J., concurring) ("the source of the delay, the reasons for it, and whether the delay prejudiced interests protected by the Speedy Trial Clause").

[88] 407 U.S. at 533.

[89] *Id.* at 534.

[90] *Id.* While the Court conceded that a certain degree of prejudice would naturally arise from the 10 months Barker spent in confinement, they found "no claim that any of Barker's witnesses died or otherwise became unavailable owing to the delay." *Id.*

[91] *Id.*

in anticipation that an acquittal of Manning would avert his own conviction.[92]

The difficulties and inconsistencies spawned by *Barker* will be fully discussed in the next section; however, one ironical point deserves immediate comment. The "demand-waiver" doctrine, spurned by the Court as inconsistent with a waiver of constitutional rights,[93] placed the burden squarely on the government to bring a defendant to trial.[94] Nevertheless, the Court bottomed its decree on Barker's failure to demand a trial, treating it essentially as a waiver of his right.

C. *Development of the Balancing Test*

Since the Supreme Court has not yet undertaken to qualify or clarify significantly its decision in *Barker*, the scope of the "balancing test" has been defined by the lower federal courts. As an initial proposition, it is tendered that the test as delineated by the courts is unduly restrictive. This section will examine how the federal circuit courts of appeals have endeavored to balance the four factors identified in *Barker*[95] and point out the misconceptions and incongruities arising in the process.

1. Length of the Delay

The first and possibly the least complicated factor is the length of the delay. The Court in *Barker* characterized this factor as a "triggering device,"[96] and it is evident that most courts have subsequently treated it as such. As should be expected, delays of varying length[97] have suf-

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[92] "The probable reason for Barker's attitude was that he was gambling on Manning's acquittal." *Id.* at 535. The Court obviously suffered no pangs of conscience by allowing the government to gamble with Barker's constitutionally protected right through a series of 16 continuances.

[93] *Id.* at 525, *citing* Johnson v. Zerbst, 304 U.S. 458 (1938).

[94] "A defendant has no duty to bring himself to trial; the State has that duty as well as insuring . . . that the trial is consistent with due process." 407 U.S. at 527.

[95] See notes 83 through 86 and accompanying text *supra*.

[96] See note 83 and accompanying text *supra*.

[97] *See, e.g.*, United States v. Baumgarten, 517 F.2d 1020 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 152 (1976) (21 months); Ricon v. Garrison, 517 F.2d 628 (5th Cir.), *cert. denied*, 96 S. Ct. 195 (1975) (7 years); United States v. Llaca Orbiz, 513 F.2d 816 (1st Cir.), *cert. denied*, 96 S. Ct. 117 (1975) (4 years); United States v. Drummond, 511 F.2d 1049 (2d Cir.), *cert. denied*, 96 S.Ct. 81 (1975) (1 year); United States v. Lynch, 499 F.2d 1011 (D.C. Cir. 1974) (31 months); United States v. Bey, 499 F.2d 194 (3d Cir.), *cert. denied*, 419 U.S. 1003 (1974) (5 years); United States v. Annerino, 495 F.2d 1159 (7th Cir. 1974) (15 months); United States v. MacKay, 491 F.2d 616 (10th Cir. 1973), *cert. denied*, 416 U.S. 972 (1974) (17 months); United States v. Reynolds, 489 F.2d 4 (6th Cir. 1973), *cert. denied*,

ficed to "trigger" consideration of the other factors comprising the balancing test. Some courts have demonstrated an inclination to compare the length of a given delay to that existing in previous cases,[98] particularly the delay appraised in *Barker*.[99] This approach is unsound and should be abandoned. The number of days or years comprising a particular delay is relevant only in light of the other three factors in the balancing test, and a comparison may distort the court's perspective of the balancing process.[100]

In discussing this factor, the *Barker* Court announced that "[u]ntil there is some delay which is presumptively prejudical, there is no necessity for inquiry into the other factors that go into the balance."[101] While the courts have paid lip service to this proposition,[102] it is unfortunate that the Court chose to utilize the "presumptively prejudicial" characterization. In delineating the prejudice factor of the test, the Court made no mention of a presumption of prejudice and, when applying the test to Barker's claim, noted:

> Of course, Barker was prejudiced to some extent by living for over four years under a cloud of suspicion and anxiety. Moreover, although he was released on bond for most of the period, he did spend 10 months in jail before trial. But *there is no claim* that any of Barker's witnesses died or otherwise became unavailable owing to the delay.[103]

In light of this inconsistency, some courts in discussing the length of delay have opted to speak of a delay requiring inquiry into the re-

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416 U.S. 988 (1974) (2 years); Hoskins v. Wainwright, 485 F.2d 1186 (5th Cir. 1973) (8 and one-half years).

[98] *See, e.g.*, United States v. Perez, 489 F.2d 51, 71-72 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974); United States v. Reynolds, 489 F.2d 4, 7 (6th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974); United States v. Infanti, 474 F.2d 522, 527 (2d Cir. 1973).

[99] *See, e.g.*, Ricon v. Garrison, 517 F.2d 628, 632 (4th Cir.), *cert. denied*, 96 S. Ct. 195 (1975); United States *ex rel.* Walker v. Henderson, 492 F.2d 1311, 1315 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974).

[100] For an example of the correct approach, see United States v. Roberts, 515 F.2d 642 (2d Cir. 1975), where the court noted:

> At the time of Roberts' motion to dismiss the post-indictment delay was considerably shorter than others countenanced by this court. On the other hand, as the Court made clear in Barker v. Wingo . . . a delay not patently unreasonable in length may nonetheless be intolerably long in light of the particular circumstances of the case.

Id. at 646 (citations omitted).

[101] Barker v. Wingo, 407 U.S. 514, 530 (1972).

[102] *E.g.*, Trigg v. Tennessee, 507 F.2d 949, 953 (6th Cir. 1974), *cert. denied*, 420 U.S. 938 (1975); United States v. Macino, 486 F.2d 750, 752 (7th Cir. 1973).

[103] Barker v. Wingo, 407 U.S. 514, 534 (1972) (emphasis added).

maining factors of the balancing test.[104] Only one court, however, has resorted to a rule-of-thumb test rendering any delay in excess of a prescribed number of days deserving of constitutional analysis.[105] Consistent with the proposition that the length of the delay is a mere starting point in assessing a speedy trial claim, virtually every circuit has refused to find excessive length alone a sufficient reason to declare a delay constitutionally impermissible.[106] Their refusal is wholly consistent with *Barker* and recognizes that, because of the numerous individuals and circumstances involved, some passage of time is necessary before an accused can be brought to trial.

Appraisal of the length of delay is, of course, predicated on a computation of the number of days, months, or years involved. *Barker* furnished no suggestion as to how this computation is to be made, requiring the courts to resort consistently to *Marion* as a benchmark. The *Marion* Court established that "the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused.' "[107] The lower courts have consistently endorsed this proposition,[108] and as a result, the base point for computing the length of delay has been regarded as the date a complaint is filed,[109] the date of arrest,[110] or the date of indictment (information).[111] This general rule was

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[104] *E.g.*, United States v. Jones, 475 F.2d 322 (D.C. Cir. 1972); United States v. Saglimbene, 471 F.2d 16 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

[105] United States v. West, 504 F.2d 253, 255 (D.C. Cir. 1974) ("In this circuit a delay of more than one year between arrest and trial gives prima facie merit to a Sixth Amendment challenge.").

[106] *E.g.*, Morris v. Wyrick, 516 F.2d 1387 (8th Cir. 1975); United States v. Lynch, 499 F.2d 1011 (D.C. Cir. 1974); United States v. Laborde, 496 F.2d 965 (6th Cir. 1974); United States v. Clay, 481 F.2d 133 (7th Cir.), *cert. denied*, 414 U.S. 1009 (1973); United States v. Spoonhunter, 476 F.2d 1050 (10th Cir. 1974); United States v. Burnett, 476 F.2d 726 (5th Cir. 1973); United States *ex rel.* Stukes v. Shovlin, 464 F.2d 1211 (3d Cir. 1972).

[107] United States v. Marion, 404 U.S. 307, 313 (1971).

[108] *E.g.*, United States v. Manning, 509 F.2d 1230, 1234 (9th Cir. 1974); United States v. Ricketson, 498 F.2d 367, 370 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974); United States v. Rucker, 496 F.2d 1241, 1242 (8th Cir.), *cert. denied*, 419 U.S. 965 (1974); United States v. Smith, 487 F.2d 175, 177 (5th Cir. 1973), *cert. denied*, 419 U.S. 846 (1974); United States v. Churchill, 483 F.2d 268, 272-73 (1st Cir. 1973); United States v. Merrick, 464 F.2d 1087, 1090 (10th Cir.), *cert. denied*, 409 U.S. 1023 (1972); United States v. Schwartz, 464 F.2d 499, 503 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972).

[109] *E.g.*, United States v. Terrack, 515 F.2d 558 (9th Cir. 1975); United States v. Taylor, 465 F.2d 1199, 1201 (10th Cir. 1972); Northern v. United States, 445 F.2d 427, 429 (9th Cir. 1972).

[110] *E.g.*, United States v. MacDonald, Nos. 75-1870, -1871 (D.C. Cir., Jan. 23, 1976); United States v. Macino, 486 F.2d 750, 753 (7th Cir. 1973); United States v. Taylor, 469 F.2d 284, 285 (3d Cir. 1972) (per curiam); United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973). *But see* United States v. DeTienne, 468 F.2d 151, 155 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973) ("It would be absurd in the

not followed, however, in *Smith v. Cox*,[112] where the Fourth Circuit distinguished *Marion* on its facts. In *Smith*, an arrest warrant was issued for appellant on February 25, 1965, but was not served until September 7, 1966. At the time the warrant was issued, appellant was incarcerated on another charge.[113] Holding that Smith became an "accused" when the warrant was issued rather than the date of indictment some 2 years later, the court said:

> We cannot equate the factual situation here, where an arrest warrant had been issued but not served because Smith was already incarcerated, with the factual situation in *Marion* where individuals enjoyed their freedom while an investigation to determine whether to accuse them ran its course.[114]

While the holding in *Smith* is thought to be correct, the court's strained distinction could have been avoided simply by applying the rule of *Smith v. Hooey*:[115] that the state "had a constitutional duty to make a diligent, good-faith effort"[116] to bring Smith to trial. It has also been suggested that the computation should begin when the government has obtained sufficient evidence to secure an indictment or have the defendant arrested.[117] While this rationale has usually been rejected in light of *Marion*,[118] a more compelling argument is that the process of determining at what point the government has evidence sufficient to establish probable cause would introduce more uncertainty into an already perplexing area of the law.

The principal deficiency seen in the lower courts' application of the delay factor lies in their refusal to treat it as more than a triggering mechanism. For example, a defendant whose trial has been delayed for

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extreme if an arrest on one charge triggered the Sixth Amendment's speedy trial protection as to prosecutions for any other chargeable offenses."); *accord*, Favors v. Eyman, 466 F.2d 1325, 1327 (9th Cir. 1972).

[111] *E.g.*, United States v. Martinez, 498 F.2d 464, 465-66 (6th Cir.), *cert. denied*, 419 U.S. 1056 (1974); United States v. Joyner, 494 F.2d 501, 505 (5th Cir.), *cert. denied*, 419 U.S. 995 (1974); United States v. Meade, 491 F.2d 592 (3d Cir. 1974); United States v. Geller, 481 F.2d 275 (9th Cir. 1973) (per curiam).

[112] 474 F.2d 563 (4th Cir. 1973) (per curiam).

[113] *Id.* at 564.

[114] *Id.*

[115] 393 U.S. 374 (1969).

[116] *Id.* at 383.

[117] *E.g.*, Dickey v. Florida, 398 U.S. 30, 46 (1970) (Brennan, J., concurring); Steinberg, *supra* note 58, at 255-57.

[118] *E.g.*, United States v. Griffin, 464 F.2d 1352, 1354 (9th Cir.), *cert. denied*, 409 U.S. 1009 (1972); United States v. Merrick, 464 F.2d 1087, 1090 (10th Cir.), *cert. denied*, 409 U.S. 1023 (1972).

5 years is given the same treatment with respect to his speedy trial claim as a defendant whose trial has been delayed only 1 year. This injustice could be remedied through an approach similar to the one taken in *United States v. Macino*,[119] where the court found "delay . . . inextricably tied to the question of prejudice. As the length of the delay extends, the more certain prejudice is to result."[120]

2. Reason for the Delay

The second factor to consider in the balancing process is the government's reason for the delay. The *Barker* Court appreciated that delays could have different causes and appropriately assigned different weights to them.

> A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.[121]

While the lower courts have attempted adherence to these guidelines, experience has proved it difficult to pigeon-hole the myriad of reasons contributing to a delay in trial. Nevertheless, a few general observations are appropriate.

It is quite clear that the courts will not tolerate intentional government delay and proof thereof is accorded great weight. For example, in *Arrant v. Wainwright*,[122] the court, in holding that the defendant was denied a speedy trial, found that

> [t]he state attorney who handled [the] case quite candidly stated to the district court under oath that he kept putting off trial because he "did not want to see [the appellant] . . . acquitted . . . ."[123]

In *United States v. Lara*,[124] the court affirmed the dismissal of an indictment upon finding that the government had subsequently indicted the defendant in another jurisdiction, "seeking the supposed advantage of

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[119] 486 F.2d 750 (7th Cir. 1973).

[120] *Id.* at 752.

[121] 407 U.S. 514, 531 (1972) (footnote omitted).

[122] 468 F.2d 677 (5th Cir. 1972), *cert. denied*, 410 U.S. 947 (1973).

[123] *Id.* at 681.

[124] 520 F.2d 460 (D.C. Cir. 1975).

more favorable treatment."[125] Intentional government delay should dictate more than simply weighing the delay more heavily in favor of the accused. When the length of the delay is long enough to trigger a *Barker* analysis, intentional government delay should result in automatic dismissal.[126] More often than not, no evidence of intentionally dilatory tactics exists, and some courts have considered this factor in mitigating delay otherwise chargeable to the government.[127] Likewise, the absence of a claim or showing of intentional government delay is fatal to a defendant asserting a denial of due process in a preindictment delay.[128]

The *Barker* Court recognized that "[d]elay is not an uncommon defense tactic."[129] Where the delay in question is intentionally caused by the defendant in hopes of gaining a tactical advantage, he will not be heard to complain.[130] Likewise, the government will not be charged with any delay experienced while the accused is a fugitive,[131] has escaped from custody,[132] or is otherwise unavailable for trial.[133] The contention

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[125] *Id.* at 465.

[126] Note, *The Constitutional Guarantee of Speedy Trial*, 8 IND. L. REV. 414, 430 (1974); *see* Note, *The Lagging Right to a Speedy Trial*, *supra* note 9, at 1592.

[127] *E.g.*, United States v. Jackson, 508 F.2d 1001, 1005 (7th Cir. 1975) (government counsel unable to meet trial date); United States v. Rucker, 496 F.2d 1241, 1243 (8th Cir.), *cert. denied*, 419 U.S. 965 (1974) (government negligently failed to make an early arrest); United States v. Schwartz, 464 F.2d 499, 504 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972); *cf.* United States v. Mulligan, 520 F.2d 1327, 1331 (6th Cir. 1975); United States v. Bey, 499 F.2d 194, 203 (3d Cir.), *cert. denied*, 419 U.S. 1003 (1974); United States v. Smith, 464 F.2d 194, 197 (10th Cir.), *cert. denied*, 409 U.S. 1066 (1972).

[128] *E.g*, United States v. Manning, 509 F.2d 1230, 1234 (9th Cir. 1974); United States v. Giacalone, 477 F.2d 1273, 1276 (6th Cir. 1973); United States v. Rosenstein, 474 F.2d 705, 716 (2d Cir. 1973); United States v. DeTienne, 468 F.2d 151, 156 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973).

[129] 407 U.S. 514, 521 (1972).

[130] *E.g.*, United States v. Franks, 511 F.2d 25, 37 (6th Cir.), *cert. denied sub nom.*, Mitchell v. United States, 422 U.S. 1042 (1975); United States v. Fasanaro, 471 F.2d 717, 718 (2d Cir. 1973) (per curiam); United States v. Saglimbene, 471 F.2d 16, 18 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); United States v. Taylor, 469 F.2d 284, 285 (1972) (per curiam); *see* Note, *The Lagging Right to a Speedy Trial*, *supra* note 9, at 1598.

[131] *E.g.*, United States v. Terrack, 515 F.2d 558, 559 (9th Cir. 1975); United States v. Weber, 479 F.2d 331, 332 (8th Cir. 1973) (per curiam); *see* United States v. Parish, 468 F.2d 1129, 1137 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 957 (1973).

[132] *E.g.*, Ricon v. Garrison, 517 F.2d 628, 632 (4th Cir.), *cert. denied*, 96 S. Ct. 195 (1975); *cf.* United States v. McKim, 509 F.2d 769 (5th Cir. 1975).

[133] *See, e.g.*, United States v. Palmer, 502 F.2d 1233, 1238 (5th Cir. 1974), *rev'd and remanded sub nom.*, Dillingham v. United States, 96 S. Ct. 303 (1975) (per curiam) (defendant moved without leaving a forwarding address and the government could not locate him); United States v. Ackerson, 502 F.2d 300, 303 (8th Cir. 1974) (government could not locate defendant); United States v. Bey, 499 F.2d 194, 203-04 (3d Cir.), *cert. denied*, 419 U.S. 1003 (1974), *vacated and remanded*, 95 S. Ct. 769 (1975) (defendants whereabouts unknown); United States v. LaBorde, 496 F.2d 965, 968 (6th Cir. 1974) (defendant outside jurisdiction of court).

has been rejected, however, that the defendant's unavailability can legitimately be excused by incarceration on another charge. In *Morris v. Wyrick*,[134] defendant was indicted on July 21, 1970, while serving a sentence on another conviction but not tried until Novermber 2, 1971.[135] Although the court refused to find an unconstitutional delay, it reasoned that the defendant's incarceration did "not explain the delay, since it would mean that [he] was readily available for trial."[136]

During the last 5 years, the number of criminal cases filed in the federal district courts has consistently increased.[137] Unfortunately, the number of federal judges, prosecutors, and court personnel has not grown at a comparable rate. As a consequence, the courts have been faced with a host of cases assigning institutional inadequacies as the reason for delay. As previously noted, *Barker* labeled such reasons "neutral,"[138] requiring consideration but warranting less weight in the balancing process. Following this lead, the lower courts have exhibited little concern over a trial judge's inability to hear the case[139] or personnel problems in the United States Attorney's office.[140] Likewise, the courts consistently concede that delay attributable to a crowded criminal docket is entitled to less influence in a speedy trial analysis.[141] While

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[134] 516 F.2d 1387 (8th Cir. 1975).

[135] *Id.* at 1389.

[136] *Id.* at 1390 (footnote omitted); *accord*, Ricon v. Garrison, 517 F.2d 628, 633 (4th Cir.), *cert. denied*, 96 S. Ct. 195 (1975) ("[T]he mere fact that one is already under sentence as a result of another charge is not a complete justification for delay in his trial on other pending charges."). *See generally* Yackle, *supra* note 41.

[137] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANAGEMENT STATISTICS (1975).

[138] 407 U.S. 514, 531 (1972).

[139] *See, e.g.*, United States v. Douglas, 504 F.2d 213, 216 (D.C. Cir. 1974) (judge committed to other duties); United States v. Ricketson, 498 F.2d 367, 371 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974) (new judge with older cases to try); United States v. Jones, 475 F.2d 322, 324 (D.C. Cir. 1972) (per curiam) (judge involved in other litigation). *But see* United States v. Cooper, 504 F.2d 260, 262 (1974) (per curiam) (conviction affirmed but court noted that the trial judge's occupation "with other trial duties . . . is . . . weak ground upon which to stand against the constitutional right [of a speedy trial]").

[140] *E.g.*, United States v. Rodriguez, 510 F.2d 1, 3 (5th Cir. 1975) (no permanent Assistant United States Attorney); United States v. Favalaro, 493 F.2d 623, 625 (2d Cir. 1974) (turnover in personnel); *cf.* Morris v. Wyrick, 516 F.2d 1387, 1390 (8th Cir. 1975) (overworked prosecutors).

[141] *E.g.*, United States v. Latimer, 511 F.2d 498, 501 (10th Cir. 1975); United States v. Rodriguez, 510 F.2d 1, 3 (5th Cir. 1975); United States v. West, 504 F.2d 253, 256 (D.C. Cir. 1974); United States v. Joyce, 499 F.2d 9, 20 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974); United States v. Reynolds, 489 F.2d 4, 7 (6th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974); United States v. Churchhill, 483 F.2d 268, 273 (1st Cir. 1973); United States v. Infanti, 474 F.2d 522, 527 (2d Cir. 1973); United States *ex rel.* Stukes v. Shovlin, 464 F.2d 1211, 1215 (3d Cir. 1972). *But see* Barker v. Wingo, 407 U.S. 514, 537 (1972) (White,

these problems may be attributed in part to a lack of congressional concern over needed funds and judgeships,[142] the judiciary should not condone an abridgment of constitutional rights attributable solely to administrative deficiencies.

a. The Investigatory Process

It is inherent in the progression of any criminal case that some delay will result from what has been termed "the operation of the system."[143] The length of time required will naturally increase when trying more complex cases. The Supreme Court mentioned this fact in *Barker*,[144] and the lower courts have apparently followed suit.[145] A survey of the various stages from investigation to trial will be beneficial toward a more complete understanding of the lower courts' analyses of the reasons for delay.

To insure that the government has adequate time to establish its case, courts are generous in countenancing reasonable delay attending the investigatory process.[146] As the investigation stage of a case is normally completed prior to indictment or arrest, the due process standards of *Ewell* are employed as a safeguard against unreasonable delay; however, at least one court has made it clear that even after indictment it is not the purpose of the speedy trial right "to limit the ongoing accumulation of evidence by the prosecution."[147] Once the indictment or infor-

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J., concurring) ("[F]or those who desire an early trial, these personal factors should prevail if the only countervailing considerations offered . . . are those connected with crowded dockets and prosecutorial case loads.").

[142] In 1972, the Judicial Conference of the United States requested Congress to provide 65 additional judges. To date, none have been provided. Address by Mr. Chief Justice Warren E. Burger, A.B.A. Annual Meeting, Feb. 15, 1976.

[143] United States v. Brown, 520 F.2d 1106, 1109 (D.C. Cir. 1975).

[144] "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." 407 U.S. 514, 531 (1972).

[145] *E.g.*, United States v. Baumgarten, 517 F.2d 1020, 1024 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 152 (1976); United States v. Franks, 511 F.2d 25, 36 (6th Cir.), *cert. denied sub nom.*, Mitchell v. United States, 422 U.S. 1042 (1975); United States v. Manning, 509 F.2d 1230, 1234 (9th Cir. 1974); United States v. MacLain, 501 F.2d 1006, 1010 (10th Cir. 1974); United States v. Joyce, 499 F.2d 9, 20 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974); United States v. Davis, 487 F.2d 112, 117 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974); United States v. Rosenstein, 474 F.2d 705, 716 (2d Cir. 1973).

[146] *E.g.*, United States v. Zane, 489 F.2d 269, 271 (5th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974) ("Difficulty in tracing stolen vehicles and locating witnesses extended the length of the investigation."); United States v. Galardi, 476 F.2d 1072, 1075 (9th Cir.), *cert. denied*, 414 U.S. 839 (1973). *See generally* United States *ex rel.* Stukes v. Shovlin, 464 F.2d 1211, 1215 (3d Cir. 1972).

[147] United States v. Joyner, 494 F.2d 501, 506 (5th Cir.), *cert denied*, 419 U.S. 995 (1974).

mation is returned, either the government or defendant or both may consider it advantageous to engage in plea bargaining.[148] In *United States v. Taylor*[149] plea bargaining was deemed an acceptable reason for government delay[150] and in *United States v. Singleton*[151] the court attributed the delay to a defendant's refusal to cooperate with the government after he consented to do so.[152] These courts seemingly allow the defendant to sacrifice his right to a speedy trial in exchange for a possible reduction in sentence. A better approach was taken in *United States v. Roberts*,[153] where the court declared:

> We . . . reject any notion that a defendant waives his right to a speedy trial by consenting to such an agreement. Thus, if the government wishes to bargain for this condition, it may but it should do so mindful of the risks which it thereby assumes of dismissed indictments for unconstitutional delay.[154]

Since the state bears the burden of bringing the defendant to trial,[155] this rationale is not viewed as unfair. It does, however, preclude government manipulation of the overzealous defendant who seeks a lighter sentence.

b. Motion Practice

One of the more common pretrial occurrences contributing to delay involves the filing and hearing of motions.[156] The number of motions addressed to the court is often found determinative in a speedy trial analysis. For example, in *United States v. Perez*,[157] the court found assertions that the defendants desired a speedy trial inconceivable in light of the over 25 motions filed by them.[158] Regardless of the relief sought, the government is normally not charged with the time required to dispose of defense motions.[159] Likewise, *Barker* established, and the

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[148] *See* United States v. Terrack, 515 F.2d 558, 559 (9th Cir. 1975).

[149] 465 F.2d 1199 (10th Cir. 1972).

[150] *Id.* at 1202.

[151] 460 F.2d 1148 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973).

[152] *Id.* at 1152.

[153] 515 F.2d 642 (2d Cir. 1975).

[154] *Id.* at 647.

[155] Barker v. Wingo, 407 U.S. 514, 527 (1972).

[156] *E.g.*, United States v. Mulligan, 520 F.2d 1327, 1331 (6th Cir. 1975); United States v. Llaca Orbiz, 513 F.2d 816, 818 (1st Cir.), *cert. denied*, 96 S. Ct. 117 (1975); United States v. Lane, 465 F.2d 408, 411 (5th Cir. 1972). *See also* Note, *The Lagging Right to a Speedy Trial, supra* note 9, at 1598.

[157] 489 F.2d 51 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974).

[158] *Id.* at 72. Also noteworthy is the fact that Perez changed counsel 11 times before trial. *Id.*

[159] *E.g.*, United States v. Brown, 495 F.2d 593, 600 (1st Cir.), *cert. denied*, 419 U.S.

lower courts recognize,[160] that government continuances predicated by the absence of a key witness are "a valid reason . . . to justify appropriate delay."[161] When a government witness is unavailable, the courts should apply a standard of proof at least as stringent as the one imposed on defendants to establish prejudice resulting from a missing witness.[162] That is, the government should bear the burden of showing a good faith effort to locate the witness and that the witness' testimony is material to securing a conviction. Certainly, when witnesses are available and the government negligently fails to ensure their presence, any delay involved should be charged against it.

c. *The Accused's Competency*

While other supposed justifications for delay are regularly presented to the courts,[163] one final category merits individual attention. It

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965 (1974) (discovery); United States *ex rel.* Little v. Twomey, 477 F.2d 767, 771 (7th Cir.), *cert. denied*, 414 U.S. 846 (1973) (mistrial); Torres v. Florida, 477 F.2d 555, 556 (5th Cir.) (per curiam), *cert. denied*, 414 U.S. 852 (1973) (writ of prohibition); United States v. Pollard, 466 F.2d 1, 5 (10th Cir.), *cert. denied*, 409 U.S. 1127 (1972) (motion to suppress); United States v. Schwartz, 464 F.2d 499, 505 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972) (motion to dismiss); United States v. Leal, 460 F.2d 385, 389 (9th Cir.), *cert denied*, 409 U.S. 889 (1972) (removal).

[160] *E.g.*, United States v. Baumgarten, 517 F.2d 1020, 1025 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 152 (1976); United States v. Thor, 512 F.2d 811, 815 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 445 (1976) (witnesses were fugitives); United States v. Simpkins, 505 F.2d 562, 563 (4th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975) (witness requested immunity); United States v. Counts, 471 F.2d 422, 427 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973) (witness on tour of duty in Vietnam). *But see* United States v. Douglas, 504 F.2d 213, 218 (D.C. Cir. 1974) (Bazelon, C.J., concurring) ("[W]hile I believe that unavailability of a witness is a valid justification for delay, there are limits to the amount of delay which such unavailability can justify.").

[161] Barker v. Wingo, 407 U.S. 514, 531 (1972).

[162] *E.g.*, United States v. Joyner, 494 F.2d 501, 505 (5th Cir.), *cert. denied*, 419 U.S. 995 (1974). A bare assertion of general negligence in bringing a case to trial does not, however, weigh heavily against the government. *E.g.*, United States v. Gavic, 520 F.2d 1346, 1349 n.6 (8th Cir. 1975) (prosecutorial "mix-up"); United States v. Toy, 482 F.2d 741, 743 (D.C. Cir. 1973); United States v. Cabral, 475 F.2d 715, 718 (1st Cir. 1973) (a "more neutral" reason). *But see* United States v. Washington, 504 F.2d 346, 348 (8th Cir. 1974); United States v. Macino, 486 F.2d 750, 753 (7th Cir. 1973).

[163] *E.g.*, United States v. Scott, 518 F.2d 261, 268-69 (6th Cir. 1975) (defendant hospitalized); United States v. Quinones, 516 F.2d 1309, 1311 (1st Cir.), *cert. denied*, 96 S. Ct. 195 (1975) (no government response to defendant's motion); Turner v. Estelle, 515 F.2d 853, 856 (5th Cir. 1975) (defendant awaiting trial that could result in imposition of death penalty); United States v. Spoonhunter, 476 F.2d 1050, 1057 (10th Cir. 1973) (prosecutor ill). For cases in which no reason whatsoever was advanced for the delay, see United States v. Calloway, 505 F.2d 311, 316 (D.C. Cir. 1974); United States v. Martinez, 498 F.2d 464, 465 (6th Cir.), *cert. denied*, 419 U.S. 1056 (1974); Hoskins v. Wainwright, 485 F.2d 1186, 1194 (5th Cir. 1973).

perhaps goes without saying that neither the prosecution nor the defense will be eager to advance to trial where a question exists as to the defendant's competence to stand trial. For that reason, courts have hesitated to find constitutional infirmity in a delay resulting from a genuine concern over the defendant's competency.[164] One court has ventured to state that "[r]ather than being penalized for seeking assurance of the mental competency of the petitioner before ordering him to trial, the state should be commended."[165] Yet when inordinate delay results from competency determinations and additional factors in the balancing process weigh in the defendant's favor, courts should not refuse to find infringement of the speedy trial guarantee.[166]

3. Accused's Assertion of the Right

The third factor weighed in the speedy trial analysis involves the defendant's assertion of his sixth amendment right. The often harsh "demand-waiver" doctrine was abrogated in *Barker*,[167] where the Court established that the demand for trial was simply "one of the factors to be considered in an inquiry into the deprivation of the right."[168] This approach has several distinct advantages, not the least of which is avoiding the rigidity spawned by the "demand-waiver" concept. Balancing also allows the courts to consider the frequency and timeliness of a demand. Furthermore, the courts may pierce a purely pro forma demand and determine whether the accused actually desires a speedy trial.[169]

The case law reveals little difficulty encountered by the lower courts in determining when a demand has in fact been made. The assertion may arise in a motion to dismiss,[170] a petition for a writ of habeas

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[164] *E.g.*, United States v. Lynch, 499 F.2d 1011, 1018 (D.C. Cir. 1974); United States *ex rel.* Little v. Twomey, 477 F.2d 767, 770 (7th Cir.), *cert. denied*, 414 U.S. 846 (1973); United States v. Canty, 469 F.2d 114, 118 (D.C. Cir. 1972).

[165] Ricon v. Garrison, 517 F.2d 628, 632 (4th Cir.), *cert. denied*, 96 S. Ct. 195 (1975).

[166] *E.g.*, United States v. Calloway, 505 F.2d 311 (D.C. Cir. 1974) (2-year delay, 3-month delay in receiving mental evaluation, continuous assertion of right).

[167] See notes 78 through 81 and accompanying text *supra*.

[168] 407 U.S. 514, 528 (1972).

[169] *See generally* Rudstein, *supra* note 64, at 36.

[170] *E.g.*, United States v. Scott, 518 F.2d 261, 268-69 (6th Cir. 1975); United States v. Roberts, 515 F.2d 642, 645-46 (2d Cir. 1975); United States v. Joyner, 494 F.2d 501, 503 (5th Cir.), *cert. denied*, 419 U.S. 995 (1974); United States v. Macino, 486 F.2d 750, 751 (7th Cir. 1973); Favors v. Eyman, 466 F.2d 1325, 1327 (9th Cir. 1972); United States v. Pollard, 466 F.2d 1, 5 (10th Cir.), *cert. denied*, 409 U.S. 1127 (1972); United States v. Schwartz, 464 F.2d 499, 505 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972).

corpus,[171] an objection to granting a government-sought continuance,[172] or a motion for speedy trial.[173] A letter to state officials[174] or to the prosecutor[175] has also been found sufficient to constitute a demand for trial.

Regardless of the mode utilized, the courts insist that the demand be timely and more than pro forma. For example, in *United States v. Ricketson*,[176] the court noted that "[a]lthough . . . defendant initially sought an early trial, there is no indication he pressed the point thereafter. His one pro forma demand is not entitled to great weight."[177] In *United States v. Jones*,[178] the defendant was arrested on February 15, 1969, and first asserted his right to a speedy trial in a motion to dismiss on March 17, 1971, 2 days before trial.[179] In analyzing the defendant's demand, the court said:

> There is no meaningful assertion of the right where . . . the accused waits until the eve of trial to invoke it, and then only as a basis for getting rid of the prosecution. The conclusion that the accused was uninterested in a speedy trial seems . . . inevitable . . . .[180]

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[171] *E.g.*, Ricon v. Garrison, 517 F.2d 628, 630-31 (4th Cir.), *cert. denied*, 96 S. Ct. 195 (1975); Trigg v. Tennessee, 507 F.2d 949, 951 (6th Cir. 1974), *cert. denied*, 420 U.S. 938 (1975); Prince v. Alabama, 507 F.2d 693, 698 (5th Cir.), *cert. denied*, 96 S. Ct. 147 (1975) (Blackmun, J., would have granted certiorari).

[172] *E.g.*, United States v. Baumgarten, 517 F.2d 1020, 1023 (8th Cir.), *cert. denied*, 96 S. Ct. 152 (1975); United States v. Jackson, 508 F.2d 1001, 1003 (7th Cir. 1975); United States v. Spoonhunter, 476 F.2d 1050, 1057 (10th Cir. 1973).

[173] *E.g.*, United States v. Bey, 499 F.2d 194, 197 (3d Cir.), *cert. denied*, 419 U.S. 1003 (1974), *vacated and remanded*, 95 S. Ct. 769 (1975); United States v. Phillips, 482 F.2d 191, 193 (8th Cir.), *cert. denied*, 414 U.S. 1114 (1973); Arrant v. Wainwright, 468 F.2d 677, 680 (5th Cir. 1972), *cert. denied*, 410 U.S. 947 (1973).

[174] *E.g.*, Trigg v. Tennessee, 507 F.2d 949, 950 (6th Cir. 1974), *cert. denied*, 420 U.S. 938 (1975); Prince v. Alabama, 507 F.2d 693, 698 (5th Cir.), *cert. denied*, 96 S. Ct. 147 (1975). In *Prince*, the defendant wrote Alabama Governor George Wallace in an attempt to secure a trial. The letter was forwarded by a member of the Governor's staff to the prosecutor with this notation:

> "I am enclosing a letter from one of your constituents who is having a little difficulty at the present time. This man is obviously not guilty because he says so in his letter. *Thought you might get a kick out of it.*"

507 F.2d at 698 (emphasis added).

[175] *E.g.*, Prince v. Alabama, 507 F.2d 693, 697 (5th Cir.), *cert. denied*, 96 S. Ct. 147 (1975); Chauncey v. Second Judicial Dist. Ct., 474 F.2d 1238, 1239 (9th Cir. 1973).

[176] 498 F.2d 367 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974).

[177] *Id.* at 372; *accord*, United States v. Jackson, 508 F.2d 1001, 1004 (7th Cir. 1975). *But see* United States v. Llaca Orbiz, 513 F.2d 816, 818 (1st Cir.), *cert. denied*, 96 S. Ct. 117 (1975) ("We reiterate the admonition that the right to speedy trial is not dependent on repeated defense assertions.").

[178] 475 F.2d 322 (D.C. Cir. 1972) (per curiam).

[179] *Id.* at 323.

[180] *Id.* at 324. A similar conclusion was reached in United States v. Jackson, 508 F.2d

Rather than presume a lack of interest in the speedy resolution of pending charges, some courts simply weigh a lengthy postponement in demanding trial heavily against the defendant.[181] In the more complex cases requiring extensive defense preparation, courts should take notice of the untenable position in which a defendant is placed by this approach. If the defendant waits until he is sufficiently prepared to go to trial before asserting his right, the delay may be fatal. On the other hand, a premature demand may invite the government to go to trial immediately,[182] forcing the defendant to seek a continuance which will weaken his constitutional argument in the event of a lengthy delay. At any rate, the Supreme Court's opinion in *Moore v. Arizona*[183] signifies that a belated assertion of the right is not controlling when other circumstances dictate a finding of unconstitutional delay.[184]

The Court in *Barker* emphasized that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."[185] The accuracy of this statement is underscored by the number of lower court opinions finding no constitutional deprivation where the accused failed to act in securing a speedy trial.[186] There are,

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1001, 1004 (7th Cir. 1975) ("[A]n important indicator of the effect of any stress exerted on the defendant by the delay is the frequency and force of the defendant's own demands for a speedy trial."); *accord*, United States v. Churchhill, 483 F.2d 268, 273 (1st Cir. 1973).

[181] *E.g.*, Turner v. Estelle, 515 F.2d 853, 857-58 (5th Cir. 1975) (4 years after indictment); United States v. Shepherd, 511 F.2d 119, 122-23 (5th Cir. 1975) (2 weeks before trial). *See also* United States v. Gibson, 513 F.2d 978, 981-82 (6th Cir. 1975) (22 months after arrest); United States v. Toy, 482 F.2d 741, 743 (D.C. Cir. 1973) (14 months after arrest); United States v. Parish, 468 F.2d 1129, 1137 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 957 (1973) (5 months after arrest). In Morris v. Wyrick, 516 F.2d 1387 (8th Cir. 1975), the court made the specious distinction that "Morris did not demand a speedy trial in his motion—rather, he sought dismissal of the charges for lack of one." 516 F.2d at 1390.

[182] In the more complex cases, the government has years to gather and process evidence prior to indictment, restricted only by the statute of limitations; consequently, they are often prepared to go to trial within a very short time after indictment. *See generally* United States v. Joyce, 499 F.2d 9 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974) (mail fraud); United States v. Smith, 487 F.2d 175 (5th Cir. 1973), *cert. denied*, 419 U.S. 846 (1974) (violation of the Dyer Act); United States v. Giacalone, 477 F.2d 1273 (6th Cir. 1973) (income tax evasion); United States v. Dukow, 453 F.2d 1328 (3d Cir.), *cert. denied*, 406 U.S. 945 (1972) (securities).

[183] 414 U.S. 25 (1973) (per curiam).

[184] In *Moore*, the defendant first demanded extradition 8 months after charges were filed against him. *Id.* at 25. The Court, however, vacated and remanded for consideration of the prejudice question. *Id.* at 28.

[185] 407 U.S. 514, 532 (1972).

[186] *E.g.*, United States v. Goeltz, 513 F.2d 193 (10th Cir.), *cert. denied*, 96 S. Ct. 51 (1975); United States v. Franks, 511 F.2d 25 (6th Cir.), *cert. denied sub nom.*, Mitchell v. United States, 422 U.S. 1042 (1975); United States v. Calhoun, 510 F.2d 861 (7th Cir.), *cert. denied*, 421 U.S. 950 (1975); United States v. Weber, 479 F.2d 331 (8th Cir. 1973)

however, exceptions. Thus, when the accused is not represented by counsel,[187] is incompetent,[188] or the government is equally negligent,[189] the absence of demand has not tilted the scales against him.

While the balancing approach currently employed by the courts is a marked improvement over the "demand-waiver" principle, a demand for trial should not be required. The *Barker* decision explicitly placed the burden of bringing a defendant to trial on the prosecution.[190] The defendant, therefore, has no duty to bring himself to trial and is presumed innocent until proven guilty. The better rule would presume that the defendant desires a speedy trial unless some affirmative evidence exists to the contrary. At least one court applies this standard if the defendant is incarcerated.[191] In light of the prejudice that can accrue even in the absence of confinement,[192] there is no good reason not to apply an identical standard to a defendant free on bail or recognizance.

4. Prejudice to the Accused

The fourth and final factor considered in the *Barker* balancing test is the prejudice suffered due to a delay in trial. The *Barker* Court established that "prejudice . . . should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect."[193] Those interests were identified as: "(i) to prevent oppressive

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(per curiam); Jordan v. Beto, 471 F.2d 779 (5th Cir. 1973); United States v. Card, 470 F.2d 144 (5th Cir. 1972), *cert. denied*, 411 U.S. 917 (1973); United States v. Stribling, 469 F.2d 443 (6th Cir. 1972), *cert. denied*, 410 U.S. 957 (1973); United States v. Smith, 464 F.2d 194 (10th Cir.), *cert. denied*, 409 U.S. 1066 (1972).

[187] *E.g.*, United States v. Dyson, 469 F.2d 735, 740 (5th Cir. 1972). When counsel is retained, the defendant is not accorded any degree of concession. *E.g.*, United States v. Drummond, 511 F.2d 1049, 1054 (2d Cir.), *cert. denied*, 96 S. Ct. 81 (1975); United States v. Burnett, 476 F.2d 726, 729 (5th Cir. 1973); United States v. Fasanaro, 471 F.2d 717, 718 (2d Cir. 1973) (per curiam).

[188] *E.g.*, United States v. Geelan, 520 F.2d 585, 587-88 (9th Cir. 1975).

[189] *E.g.*, United States v. Cooper, 504 F.2d 260, 262 (D.C. Cir. 1974) (per curiam) (government failure to comply with FED. R. CRIM. P. 46(g)); Arrant v. Wainwright, 468 F.2d 677, 680 (5th Cir. 1972), *cert. denied*, 410 U.S. 947 (1973) (no government action on defense demand for trial). *See also* United States v. Macino, 486 F.2d 750, 753 (7th Cir. 1973) ("[T]he weight . . . given the absence of a demand in cases where the delay is between arrest and indictment is substantially less than in cases of postindictment delay.").

[190] 407 U.S. 514, 527 (1972).

[191] United States v. Calloway, 505 F.2d 311, 316-17 (D.C. Cir. 1974).

[192] "[E]ven if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." Barker v. Wingo, 407 U.S. 514, 533 (1972).

[193] *Id.* at 532. This approach has been recognized in the lower courts. *E.g.*, United States v. Latimer, 511 F.2d 498, 501 (10th Cir. 1975); United States v. Cabral, 475 F.2d 715, 719 (1st Cir. 1973).

pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."[194] A thorough discussion of the lower courts' treatment of these interests is necessary, therefore, to understand fully what has been termed the most important of the four balancing factors.[195]

a. The Burden of Proof

The *Barker* Court, as did its predecessors, failed to discuss the burden of proof with respect to a finding of prejudice. Their failure to do so has been criticized[196] and has resulted in divergent approaches by the lower courts. The majority of circuits require the defendant to prove actual prejudice, either to his person or defense.[197] This requirement makes the speedy trial right unique among the sixth amendment rights since, for example, defendants need not show that they were prejudiced by denial of counsel[198] or the right to confront witnesses.[199] While the courts have not identified any particular reason for imposing this intolerable burden,[200] it can arguably be attributed to the societal interest in convicting the guilty and a hesitancy on the part of some courts to resort to the austere sanction of dismissal.[201] In a very few cases, usually where a long delay is involved, the court has either shifted the burden to the

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[194] 407 U.S. at 532. These interests were, of course, the same as those previously catalogued by the Court in United States v. Ewell, 383 U.S. 116, 120 (1966).

[195] United States v. Baumgarten, 517 F.2d 1025, 1030 (8th Cir.), *cert. denied*, 96 S. Ct. 152 (1975); Trigg v. Tennessee, 507 F.2d 949, 954 (6th Cir. 1974), *cert. denied*, 420 U.S. 938 (1975).

[196] *E.g.*, *The Supreme Court, 1971 Term*, *supra* note 64, at 170-71 (1972); 58 CORNELL L. REV. 399, 409-10 (1973).

[197] *E.g.*, United States v. Calhoun, 510 F.2d 861, 865 (7th Cir.), *cert. denied*, 421 U.S. 950 (1975); United States v. McKim, 509 F.2d 769, 773 (5th Cir. 1975); United States v. Ducharme, 505 F.2d 691, 693 (9th Cir. 1974); United States v. Douglas, 504 F.2d 213, 216 (D.C. Cir. 1974); United States v. Bettenhausen, 499 F.2d 1223, 1232 (10th Cir. 1974); United States v. Rucker, 469 F.2d 1241, 1242 (8th Cir.), *cert. denied*, 419 U.S. 965 (1974); United States v. Nathan, 476 F.2d 456, 461 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); United States v. Cabral, 475 F.2d 715, 720 (1st Cir. 1973); United States v. Stribling, 469 F.2d 443, 444 (6th Cir. 1972), *cert. denied*, 410 U.S. 957 (1973).

[198] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

[199] *See, e.g.*, Pointer v. Texas, 380 U.S. 400 (1965).

[200] Some writers apparently feel the burden is not so intolerable. *E.g.*, Note, *The Lagging Right to a Speedy Trial*, *supra* note 9, at 1592:

> Since the major thrust of the right to speedy trial is aimed at preventing the prejudicial effects of unnecessary delay proof of the existance or non-existance of prejudice should be required in all but the most extreme cases.

[201] *E.g.*, United States v. Gavic, 520 F.2d 1346, 1350 (8th Cir. 1975); United States v. Latimer, 511 F.2d 498, 502 (10th Cir. 1975); United States v. Heinlein, 490 F.2d 725, 729 (D.C. Cir. 1973); United States v. Cabral, 475 F.2d 715, 720 (1st Cir. 1973).

government to prove that no prejudice was suffered[202] or concluded that prejudice is simply not an issue.[203] Unfortunately, these cases represent the exception rather than the rule.

Premised on a belief that the burden imposed on the criminal defendant is excessively harsh, another standard is suggested. First, it should be remembered that prejudice is but one of four factors to be considered. It should be treated as such so that a failure to establish prejudice does not end the constitutional inquiry.[204] In those cases where the delay is sufficiently long to be termed "presumptively prejudicial," the defendant should be required to affirmatively assert prejudice to his person or defense. Thereafter, the burden should shift to the government to show that no prejudice was suffered or that it was so minimal as not to weigh heavily in the defendant's favor. The superior investigative and research resources of the government will allow them to bear the burden more easily than the typical individual defendant.

b. Impairment of the Defense

Of the three interests mentioned in *Barker*, the possibility that delay will impair the defense was ordained the "most serious."[205] The Court's emphasis on this factor was unfortunate and, as a consequence, most lower courts have conducted their inquiries seemingly in disregard of the potential personal prejudices discussed in *Marion*,[206] *Klopfer*,[207] and *Smith v. Hooey*.[208] Even though the Court made it clear in *Moore v. Arizona*[209] that *Barker* "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial,"[210] most lower court decisions have

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[202] *E.g.*, United States v. Dyson, 469 F.2d 735 (5th Cir. 1972) (22 months delay).

> Where the delay is not only excessive but the result of unexcused inaction or misconduct by the Government, it is prima facie prejudicial . . . . The burden then shifts to the Government which must demonstrate that defendant has not been prejudiced by the delay.

Id. at 741, *quoting* Murrary v. Wainwright, 440 F.2d 69 (5th Cir. 1971).

[203] *E.g.*, Prince v. Alabama, 507 F.2d 693, 706-07 (5th Cir.), *cert. denied*, 96 S. Ct. 147 (1975); Hoskins v. Wainwright, 485 F.2d 1186, 1194 (5th Cir. 1973); *cf.* United States v. Lara, 520 F.2d 460, 465 (D.C. Cir. 1975) (prejudice presumed). *But see* Trigg v. Tennessee, 507 F.2d 949 (6th Cir. 1974), *cert. denied*, 420 U.S. 938 (1975).

[204] *E.g.*, United States v. Quinones, 516 F.2d 1309, 1311 (1st Cir.), *cert. denied*, 96 S. Ct. 195 (1975); United States v. Washington, 504 F.2d 346, 348 (8th Cir. 1974).

[205] 407 U.S. 514, 532 (1972).

[206] See note 60 and accompanying text *supra*.

[207] Klopfer v. North Carolina, 386 U.S. 213, 222 (1967).

[208] *See* note 44 and accompanying text *supra*.

[209] 414 U.S. 25 (1973).

[210] *Id.* at 26.

not mentioned *Moore*.[211]

The Supreme Court in *Barker* found "obvious" prejudice in the death or disappearance of witnesses during a delay.[212] The lower courts have not found this form of prejudice quite so obvious. Thus, most courts treat conclusory allegations of prejudice suffered from the death of a witness as insufficient to satisfy the defendant's burden of proof.[213] At a minimum, the defendant is required to show that the witness would have been available to meet an earlier trial date[214] or that the witness' testimony could materially aid his defense.[215] When the court determines that the witness' testimony would not alter the jury verdict,[216] that the defendant did not consider the witness important,[217] or that the testimony is otherwise available,[218] no prejudice is recognized. The court in *United States v. Lane*[219] went so far as to speculate that a deceased witness might have pleaded self-incrimination if called to testify.[220] However, in *United States v. Macino*[221] the court refused to engage in such idle speculation and noted:

> While it is true . . . that the record does not indicate whether the testimony of this witness would have been helpful, or even available, to the appellants, we cannot gainsay that it would not have been.[222]

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[211] *E.g.*, United States *ex rel.* Walker v. Henderson, 492 F.2d 1311, 1316 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974).

[212] 407 U.S. 514, 532 (1972).

[213] *E.g.*, United States v. Zane, 489 F.2d 269, 270 (5th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); United States v. Fasanaro, 471 F.2d 717, 718 (2d Cir. 1973) (per curiam).

[214] *E.g.*, Ricon v. Garrison, 517 F.2d 628, 634 (4th Cir.), *cert. denied*, 96 S. Ct. 195 (1975) (witness died 10 years before new trial granted); United States v. Infanti, 474 F.2d 522, 527 (2d Cir. 1973).

[215] *E.g.*, United States v. Baumgarten, 517 F.2d 1020, 1026 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 152 (1976) (disagreement over what testimony would have been); Turner v. Estelle, 515 F.2d 853, 860 (5th Cir. 1975); United States v. Martinez, 498 F.2d 464, 466 (6th Cir.), *cert. denied*, 419 U.S. 1056 (1974).

[216] *E.g.*, United States v. Jones, 475 F.2d 322, 324-25 (D.C. Cir. 1972) (per curiam); United States v. Canty, 469 F.2d 114, 120 (D.C. Cir. 1972).

[217] *E.g.*, United States v. Jones, 475 F.2d 322, 324-25 (D.C. Cir. 1972) (per curiam) (defendant failed to tell counsel about witness until just before trial); United States v. Merrick, 464 F.2d 1087, 1091 (10th Cir.), *cert. denied*, 409 U.S. 1023 (1972) (defendant did not introduce affidavit of dead witness in evidence).

[218] *E.g.*, United States v. Skeens, 494 F.2d 1050, 1053 (D.C. Cir. 1974) (grand jury transcript).

[219] 465 F.2d 408 (5th Cir. 1972).

[220] *Id.* at 411-12.

[221] 486 F.2d 750 (7th Cir. 1973).

[222] *Id.* at 754 (The court found a denial of the speedy trial right in an unexplained 2-year delay between arrest and indictment.); United States v. Fay, 505 F.2d 1037, 1040 (1st Cir. 1974).

It is perhaps illustrative of the present state of speedy trial analysis that the courts refuse to presume prejudice in the death of a defense witness, yet readily presume negligence or some other "neutral" reason in the absence of government explanation as to the reasons for delay.[223]

A similarly rigid standard is applied where defense witnesses are missing or are otherwise unavailable to testify. General allegations of prejudice are disregarded,[224] with most courts requiring the defendant to show how the missing witness' testimony would have aided the defense.[225] Also where other witnesses are available to testify[226] or where witnesses are not present because of the defendant's negligence,[227] claims of prejudice merit little consideration. Where the loss of testimony can be attributed to prosecutorial impropriety, however, the court will not hesitate to find impairment of the defense.[228] The cases indicate that the lower courts have missed the import of *Barker* on this question. In finding that Willie Barker did not suffer serious prejudice, the Court pointed out that "no claim that any of [his] witnesses died or otherwise became unavailable"[229] was advanced. The Court's utilization of this

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[223] *E.g.*, Ricon v. Garrison, 517 F.2d 628, 633 (4th Cir.), *cert. denied*, 96 S. Ct. 195 (1975).

[224] *E.g.*, United States v. Beckham, 505 F.2d 1316, 1319 (5th Cir.), *cert. denied*, 421 U.S. 950 (1975); United States v. Broadway, 477 F.2d 991, 996 (5th Cir. 1973); *cf.* United States v. Schwartz, 464 F.2d 499, 503 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972) (lost records).

[225] *E.g.*, United States v. Thor, 512 F.2d 811, 815 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 445 (1976) (testimony would not help because defendant confessed); United States v. Calhoun, 510 F.2d 861, 865 (7th Cir.), *cert. denied*, 421 U.S. 950 (1975); Thomas v. United States, 501 F.2d 1169, 1172 (8th Cir. 1974); United States v. Rucker, 496 F.2d 1241, 1243 (8th Cir.), *cert. denied*, 419 U.S. 965 (1974) (testimony irrelevant); United States v. Geller, 481 F.2d 275, 276 (9th Cir. 1973) (per curiam).

[226] *E.g.*, United States v. Scott, 518 F.2d 261, 269 (6th Cir. 1975); *cf.* United States *ex rel.* Little v. Twomey, 477 F.2d 767, 772 (7th Cir.), *cert. denied*, 414 U.S. 846 (1973) (no showing that another person could not have testified).

[227] *E.g.*, United States v. Gibson, 513 F.2d 978, 981 (6th Cir. 1975) (defendant had witness' address); United States v. Drummond, 511 F.2d 1049, 1054 (2d Cir.), *cert. denied*, 96 S. Ct. 81 (1975) (defendant only tried to produce one of three witnesses); United States v. Singleton, 460 F.2d 1148, 1151 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973) (defendant not prepared on trial date).

[228] In Arrant v. Wainwright, 468 F.2d 677 (5th Cir. 1972), *cert. denied*, 410 U.S. 947 (1973), the prosecutor threatened a key witness, promised her a job, and offered to care for her child in return for her assistance in convicting the defendant. *Id.* at 682-83. In concluding that the defendant was deprived of a speedy trial, the court noted:

> The allegation is clearly that appellant was denied the testimony of an admitted eyewitness to the killing because of the affirmative and highly questionable actions taken by the state attorney during the period that appellant's trial was delayed.

Id. at 683.

[229] 407 U.S. 514, 534 (1972).

example underscores its recognition of the prejudice which results when a defense witness dies or becomes unavailable. It should suffice for the defendant to made a good faith effort to secure a witness' presence at trial. If he fails in the attempt, an assertion of beneficial testimony and the nature of that testimony should give rise to a presumption of prejudice owing to the delay.

Another commonly asserted source of prejudice is that, during the delay, the memories of key witnesses or of the defendant are dimmed. Perhaps because some lapse of memory is inherent in the passage of time, the courts have not been eager to attribute prejudice to this factor. Again, a general allegation of prejudice is found wholly insufficient.[230] While several reasons are advanced by the courts to buttress their refusal to find prejudice,[231] the most common is that the prosecutor, who bears the burden of proof, will likely be more disadvantaged by a loss of memory than will the defendant.[232] The lower courts' refusal to find prejudice under these circumstances is consistent with *Barker* where "[t]he trial transcript [indicated] only two very minor lapses of memory—one on the part of a prosecution witness—which were in no way significant to the outcome."[233] The Court in *Barker*, however, made no attempt to reconcile this conclusion with their earlier statement that "[l]oss of memory . . . is not always reflected in the record because what has been forgotten can rarely be shown."[234] If the Court meant to require proof that a fact or set of circumstances has been forgotten *and* that if remembered would have significantly altered the outcome, the defendant indeed faces a herculean task.

Lower court reliance on the obviously contradictory approach in *Barker* is unfortunate. The proof of guilt or innocence by the adversary

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[230] *E.g.*, United States v. Beckham, 505 F.2d 1316, 1319 (5th Cir.), *cert. denied*, 421 U.S. 950 (1975); United States v. Broadway, 477 F.2d 991, 996 (5th Cir. 1973); United States v. DeTienne, 468 F.2d 151, 157 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973).

[231] The courts have refused to find prejudice where the defendant took advantage of a government witness' failing memory, United States *ex rel.* Walker v. Henderson, 492 F.2d 1311, 1316 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974), where other information gained from discovery and the transcript was available, United States v. Benson, 487 F.2d 978, 985 (3d Cir. 1973), and where no specific examples of memory impairment were cited, United States v. Mulligan, 520 F.2d 1327, 1332-33 (6th Cir. 1975); *cf.* United States v. Galardi, 476 F.2d 1072 (9th Cir.), *cert. denied*, 414 U.S. 839 (1973) (memory lapse not sufficient to show actual prejudice in case of preindictment delay).

[232] *E.g.*, United States v. Mulligan, 520 F.2d 1327, 1332-33 (6th Cir. 1975); United States *ex rel.* Little v. Twomey, 477 F.2d 767, 771 (7th Cir.), *cert. denied*, 414 U.S. 846 (1973); United States v. Merrick, 464 F.2d 1087, 1091 (10th Cir.), *cert. denied*, 409 U.S. 1023 (1972).

[233] Barker v. Wingo, 407 U.S. 514, 534 (1972).

[234] *Id.* at 532.

method relies heavily on the oral recollections of witnesses.[235] While the ability to recall events and persons varies among individuals, lengthy delay unquestionably mutes even the sharpest memory. At some point the integrity of the fact-finding process is destroyed. Extreme delay should warrant dismissal on this basis alone, regardless of the other circumstances involved.

c. *Anxiety and Concern*

The majority of lower courts have been more concerned with the existence or lack of impairment of the defense than with the second interest protected by the speedy trial guarantee: "[T]o minimize anxiety and concern of the accused."[236] One readily apparent reason is the *Barker* decision itself. The Court recognized that Barker was "prejudiced to some extent by living for over four years under a cloud of suspicion and anxiety," yet found the prejudice "minimal."[237] If the anxiety and concern suffered by Willie Barker over the pendency of a criminal indictment for over 4 years is insufficient to warrant dismissal, one must wonder when it will ever merit such action.

Against this background, only one case has been found where a lower court recognized the personal prejudice arising from anxiety and concern over pending charges. In *United States v. Macino*,[238] appellants were arrested on April 8, 1968, for attempting to pass counterfeit federal reserve notes. No further action was taken by the government until indictments were obtained in August 1970,[239] and no explanation was advanced to justify the delay.[240] Although the court found no impairment of the defense, their finding of personal prejudice was explained by declaring:

> As to the anxiety and stigma which inevitably attach to arrest and indictment, we must recognize that they exist despite the fact that a trial transcript or court record will seldom reveal them. Nor can this form of prejudice be treated lightly.[241]

The general rule advanced is, however, that the defendant must show something more than the normal anxiety attendant to every criminal

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[235] *See generally* C. McCormick, Law of Evidence § 9 (2d ed. E. Cleary ed. 1972).
[236] Barker v. Wingo, 407 U.S. 514, 532 (1972).
[237] *Id.* at 534.
[238] 486 F.2d 750 (7th Cir. 1973).
[239] *Id.* at 751. A preliminary hearing was held, however, on April 25, 1968. *Id.*
[240] *Id.* at 752.
[241] *Id.* at 753.

prosecution.[242] A common approach is to measure the quantum of any anxiety where the defendant has not demanded a speedy trial[243] or where none is reflected in the record.[244] One court, noting the absence of any specific evidence, refused to find prejudice in the defendant's contention of anxiety because he failed to "describe precisely its nature and ramifications."[245] Whether the defendant must introduce expert testimony at trial to corroborate his allegations of anxiety and concern[246] or whether it will suffice for friends and acquaintances to testify that he has not been the same person since the charges were filed is not clear.

A different question is presented when the defendant is already incarcerated for another offense. In *Smith v. Hooey*,[247] petitioner was incarcerated in a federal penitentiary for the duration of a delay encompassing 6 years after his indictment on state charges.[248] The Court made it clear that

> while it might be argued that a person already in prison would be less likely than others to be affected by "anxiety and concern accompanying public accusation," there is reason to believe that an outstanding untried charge . . . can have fully as depressive an effect upon a prisoner as upon a person who is at large.[249]

Without recognizing *Smith*, some lower courts have either attributed any anxiety that arises to another charge[250] or have failed to even mention the possibility that such anxiety exists.[251]

One commentator has postulated that "[t]here is no way of prov-

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[242] *E.g.*, United States v. Shepherd, 511 F.2d 119, 123 (5th Cir. 1975); United States v. Jackson, 508 F.2d 1001, 1004 (7th Cir. 1975); United States v. Saglimbene, 471 F.2d 16, 18 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

[243] *E.g.*, United States v. Mulligan, 520 F.2d 1327, 1332 (6th Cir. 1975); United States v. Calhoun, 510 F.2d 861, 865 (7th Cir.), *cert. denied*, 421 U.S. 950 (1975).

[244] *E.g.*, United States v. Reynolds, 489 F.2d 4, 7 (6th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974).

[245] United States v. Morse, 491 F.2d 149, 157 (1st Cir. 1974).

[246] In United States *ex rel.* Stukes v. Shovlin, 464 F.2d 1211 (1972), the defendant's severe anxiety reaction was confirmed by a prison psychiatrist. *Id.* at 1214-15. Despite a 14-month delay and repeated requests for a speedy trial, the court found no constitutional deprivation since it found the delay justified. *Id.* at 1215. This case should give the reader an idea of how the balancing test should not be applied.

[247] 393 U.S. 374 (1969).

[248] *Id.* at 375.

[249] *Id.* at 379.

[250] *E.g.*, United States v. Beckham, 505 F.2d 1316, 1320 (5th Cir.), *cert. denied*, 421 U.S. 950 (1975).

[251] *E.g.*, United States v. Skeens, 494 F.2d 1050 (D.C. Cir. 1974); United States *ex rel.* Walker v. Henderson, 492 F.2d 1311 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974); Gerberding v. United States, 471 F.2d 55 (8th Cir. 1973).

ing the prejudice to the accused which occurs outside the courtroom . . . the public suspicion, the severing of family and social ties, and the personal anxiety."[252] Until the courts concede to the accuracy of this statement and recognize that stale charges breed anxiety in all but the most hardened criminals, constitutional rights will continue to be denied without remedy. A test that presumes increased anxiety and concern from extensive delay, at least in the case of an incarcerated defendant, will not only be fairer but will engender a healthy respect among prosecutors for the speedy trial right.

d. Oppressive Pretrial Incarceration

Even though Willie Barker spent 10 months in pretrial confinement before his release on bail,[253] the *Barker* Court found the prejudice suffered to be minimal. Suprisingly, at least one lower court has presumed prejudice as a result of excessive pretrial incarceration,[254] while another has emphasized that it will justify dismissal only under certain circumstances.[255] There are, however, too few decisions addressing the subject to proffer a general rule.

The question arises more often where the accused is already incarcerated at the time charges are brought. Again, *Smith v. Hooey*[256] addressed this very question:

> At first blush it might appear that a man already in prison . . . is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the fact is that delay . . . may ultimately result in as much oppression as is suffered by one who is jailed without bail on an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly . . . the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge . . . .[257]

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[252] Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 864 (1957).

[253] Barker v. Wingo, 407 U.S. 514, 517 (1972).

[254] *See* United States v. DeTienne, 468 F.2d 151, 157 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973).

[255] *See* United States v. Calloway, 505 F.2d 311 (D.C. Cir. 1974); United States v. West, 504 F.2d 253 (D.C. Cir. 1974).

[256] 393 U.S. 374 (1969).

[257] *Id.* at 378 (citation omitted); *see* Hoskings v. Wainwright, 485 F.2d 1186, 1190 (5th Cir. 1973); Yackle, *supra* note 41. *See also* Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 RUTGERS L. REV. 828, 834-36 (1964); Comment, *The Detainer System and the Right to a Speedy Trial*, 31 U.CHI. L. REV. 535, 537-38 (1964).

The lower courts have not been as impressed with these possibilities as was the Court in *Smith*. Many courts have dismissed as "speculative" assertions that an opportunity for parole[258] or a concurrent sentence[259] were lost because of a delay in the trial of pending charges. Perhaps defendants in these jurisdictions should subpoena the wardens or judges involved in their cases as witnesses on their behalf. Surely this absurd reasoning was not intended by the *Smith* Court. Neither could they have foreseen that a court, as in *United States v. Meade*,[260] would conclude that a defendant's inability to obtain a concurrent sentence "was not an interest that the speedy-trial right was designed to protect."[261] Though it is agreed that a court need not presume prejudice just because a defendant is incarcerated in another jurisdiction,[262] neither should it continue to disregard the possibilities addressed in *Smith*. To do so is to ignore the fact that pretrial incarceration is "incompatible with the presumption of innocence."[263]

II. The Speedy Trial Act of 1974

On July 13, 1971, the Senate Subcommittee on Constitutional Rights held the initial hearings on a specific legislative proposal to insure a speedy trial for all federal criminal defendants.[264] The Speedy Trial Act of 1971, introduced by Senator Sam J. Ervin, Jr., on February 22, 1971,[265] was virtually identical to the Speedy Trial Act of 1970.[266] In essence, the 1971 Act required a defendant to be tried within 60 days

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[258] *E.g.*, United States v. LaBorde, 496 F.2d 965, 968 (6th Cir. 1974).

[259] *E.g.*, United States v. Brown, 495 F.2d 593, 600 n.8 (1st Cir.), *cert. denied*, 419 U.S. 965 (1974); *cf.* Ricon v. Garrison, 517 F.2d 628, 634 (4th Cir.), *cert. denied*, 96 S. Ct. 195 (1975) (defendant convicted seven other times and never received a concurrent sentence).

[260] 491 F.2d 592 (3d Cir. 1974).

[261] *Id.* at 594; *cf.* United States v. Ricketson, 498 F.2d 367, 371 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974) (loss of chance for parole or concurrent sentence not relevant to due process analysis of preindictment delay).

[262] *See, e.g.*, Morris v. Wyrick, 516 F.2d 1387, 1391 (8th Cir. 1975).

[263] Godbold, *supra* note 5, at 272, *citing* Dickey v. Florida, 398 U.S. 30, 50 (1970) (Brennan, J., concurring).

[264] *See Hearing on S. 895 Before Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) [hereinafter cited as *1971 Hearings*].

[265] *Id.* at 2 (opening statement of Senator Sam J. Ervin, Jr.).

[266] S. 3936, 91st Cong., 2d Sess. (1970). After its introduction in the 91st Congress, a copy of S. 3936 was forwarded to over 300 judges and attorneys across the country. The Senate Subcommittee on Constitutional Rights received 225 responses which were considered in addition to the testimony of 20 witnesses who appeared during the 1971 Senate hearings. S. Rep. No. 1021, 93rd Cong., 2d Sess. 4 (1974) [hereinafter cited as 1974 S. Rep.].

from the date of arrest or indictment,[267] excluding certain specified periods of delay.[268] In the event a defendant, "through no fault of his own or his counsel," was not brought to trial within the time specified, the sole sanction was dismissal of the indictment.[269] Contrary to its current stance, the Justice Department declared its support of the legislation in principle.[270] An amended version of the 1971 proposal was introduced in the Senate on February 5, 1973.[271] An examination of the hearings that followed is necessary to illuminate the complexity of the issues presented by the Speedy Trial Act of 1974.

Recognizing that no single set of circumstances or component within the criminal justice system could be credited with the "speedy trial crisis"[272] facing Congress, committees in both Houses heard testimony from a broad cross-section of the legal community. Judges,[273] prosectuors,[274] legal scholars,[275] defense lawyers,[276] and administrative experts[277] testified as to both the wisdom and ramifications of speedy trial

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[267] S. 895, 92d Cong., 1st Sess., § 101, ch. 208, § 3161(b)(1) (1971). Some judges thought it unrealistic to expect the courts to be able to compact the entire trial process into 60 days. *See* Letter from Chief Judge Barley Brown to Senator Sam J. Ervin, Jr., Sept. 24, 1970, reprinted in *Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 163 (1971); Letter from Judge George L. Hart, Jr. to Senator Sam J. Ervin, Jr., June 22, 1970, reprinted in *id.* at 169; Letter from Chief Judge M.C. Matthes to Senator Ervin, October 16, 1970, reprinted in *id.* at 179.

[268] S. 895, 92d Cong., 1st Sess. §§ 3161(c)(1)-(8) (1971).

[269] *Id.* at § 3162.

[270] *1971 Hearings* 95 (statement of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Justice Dept.).

[271] S.754, 93d Cong., 1st Sess. (1973).

[272] *Hearings on S.754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 2 (1973) (opening statement of Senator Sam J. Ervin, Jr.) [hereinafter cited as *1973 Hearings*].

[273] *E.g., Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 773, and H.R. 4807, Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 240 (1974) (testimony of Honorable John Feikens, Judge, United States District Court, Eastern District of Michigan) [hereinafter cited as *1974 Hearings*]; *1971 Hearings* 73 (testimony of Honorable Albert Lee Stephens, Jr., Chief Judge, United States District Court, Central District of California).

[274] *E.g., 1974 Hearings* 206 (statement of James L. Treece, United States Attorney for Colorado); *1973 Hearings* 131 (testimony of Carol S. Vance, President, National District Attorneys Association).

[275] *E.g., 1974 Hearings* 261 (testimony of Daniel J. Freed Professor of Law and Its Administration, Yale Law School); *1973 Hearings* 138 (statement of Dallin H. Oaks, President, Brigham Young University).

[276] *E.g., 1974 Hearings* 252 (testimony of James E. Roberts, Chief Federal Public Defender, United States District Court, Eastern District of Michigan).

[277] *E.g., 1974 Hearings* 176 (testimony of Rowland F. Kirks, Director, Administrative

legislation. While witness opinion was naturally quite diverse, those Congressmen most closely associated with the Act remained steadfast in one general assumption—only Congress could make the sixth amendment guarantee work.[278] The balancing test announced in *Barker v. Wingo* was characterized as "a neutral test which reinforces the legitimacy of delay," providing "no guidance to either the defendant or the criminal justice system."[279] Only one witness proferred that the "approach of the United States Supreme Court to the issue of a speedy trial is the only logical one."[280] Despite the evident discontent with Supreme Court progress toward solving the problem, a great deal of committee time was devoted to considering the pros and cons of Rule 50(b) of the Federal Rules of Criminal Procedure.

Rule 50(b) was submitted to Congress by the Supreme Court in June 1972, and became effective in January 1973.[281] It directed each district court to

> prepare a plan for the prompt disposition of criminal cases which shall include rules relating to time limits within which procedures prior to trial, the trial itself, and sentencing must take place . . . .[282]

To assist implementation of Rule 50(b), the Administrative Office of the United States Courts promulgated a Model Plan and submitted it to the district courts. The Model Plan suggested that criminal defendants be arraigned within a 20-day or 30-day period respectively, depending on whether they were in custody or were released prior to trial.[283] There-

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Office of the United States Courts); *1973 Hearings* 162 (statement of Winslow Christian, Director, National Center for State Courts).

[278] *E.g., 1974 Hearings* 2 (opening statement of Congressman John Conyers, Jr.); *1973 Hearings* 5 (opening statement of Senator Sam J. Ervin, Jr.).

[279] H.R. REP. No. 1508, 93d Cong., 2d Sess. 11 (1974) [hereinafter cited as 1974 H.R. REP.].

[280] *1973 Hearings* 138 (testimony of Carol S. Vance, President, National District Attorneys Association).

[281] 1974 H.R. REP. 12.

[282] FED. R. CRIM. P. 50(b). No congressional hearings were held to consider Rule 50(b), and it became law as a result of the Rules Enabling Act. *1974 Hearings* 2. Mr. Justice Douglas dissented from the promulgation of Rule 50(b), stating:

> There may be several better ways of achieving the desired result [speedy trial]. This Court is not able to make discerning judgements [sic] between various policy choices where the relative advantage of the several alternatives depends on extensive fact-finding. That is a "legislative" determination. Under our constitutional system that function is left to the Congress with approval or veto by the President.

406 U.S. 981 (1972).

[283] MODEL PLAN FOR THE U.S. DISTRICT COURTS FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES, § 2(a), reprinted in *Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658,*

after, the Plan suggested that a defendant in custody be tried within 90 days and one not in custody be tried within 180 days.[284] Contrary to previous speedy trial legislation, noncompliance with established time limits carried no sanction other than release if the defendant was in custody.[285] The time sequence proposed in the Model Plan was subsequently adopted by 28 of the 94 district courts.[286] While every other district adopted a plan, considerable variations existed among the time requirements which were established.

In the face of existing 50(b) Plans in every district, the question was raised during the Congressional hearings as to whether federal speedy trial legislation was necessary. Opponents pointed out that since Rule 50(b) had gone into effect, the number of pending criminal cases had dropped significantly.[287] They repeatedly contended it would be premature to condemn the Rule as ineffective[288] and that it provided the flexibility needed to accomodate different needs existing within various districts.[289] Proponents of the Act countered that the decrease in pending criminal trials was attributable to other considerations[290] and that uniformity rather than flexibility was desired. For example, it was pointed out that

> in Georgia, if a defendant commits a crime in the Southern District, he is entitled to trial within 45 days of arraignment; in the Middle District, the same defendant would be entitled to a trial within 90 days and in the Northern District, his trial would commence within 180 days of arraignment.[291]

H.R. 687, H.R. 773, and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 93d Cong., 2d Sess. 408-09 (1974) [hereinafter cited as MODEL PLAN].

[284] MODEL PLAN § 2(b). With respect to the 180-day trial requirement, the Senate Judiciary Committee found that it hardly constituted "speedy trial." They further noted that the time requirement was not measured from arrest, but from indictment. 1974 S. REP. 19.

[285] MODEL PLAN § 4.

[286] REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE ON THE OPERATION OF PLANS FOR THE U.S. DISTRICT COURTS UNDER RULE 50(B) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, reprinted in *Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773, and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 410-11 (1974).

[287] *1974 Hearings* 178 (statement of Rowland F. Kirks, Director, Administrative Office of the United States Courts).

[288] *1974 Hearings* 367 (statement of Honorable Alfonso J. Zirpoli, Judge, United States District Court, Northern District of California); *id.* at 177 (statement of Roland F. Kirks, Director, Administrative Office of the United States Courts).

[289] *1974 Hearings* 197 (statement of W. Vincent Rakestraw, Assistant Attorney General, Office of Legislative Affairs); *1973 Hearings* 107 (statement of Senator Roman L. Hruska).

[290] *1974 Hearings* 385-86 (statement of Congressman Peter W. Rodino, Jr.).

[291] 1974 H.R. REP. 13.

Another frequently cited deficiency was that the busier courts simply adopted longer time periods, thereby encouraging a perpetuation of the status quo.[292] The soundest criticisms of Rule 50(b) were not fully developed in either House. The first is that, without providing effective sanctions for violation of prescribed time limitations, the plans provide little incentive for compliance. Futher, and perhaps more significant, the courts "cannot provide the additional resources to understaffed courts, prosecutors, and public defender agencies by adopting rules of procedure."[293]

Although the Speedy Trial Act is premised on the belief that lengthy delays in trial can no longer be tolerated, no agreement was reached in committee as to who or what shouldered the blame for existing delays. Testimony in the House Subcommittee on Crime evidences that the Justice Department blamed the Supreme Court and that the federal judges blamed the Justice Department. For example, the Assistant Attorney General, W. Vincent Rakestraw stated:

> Recent trends in the law have led to the proliferation of pre-trial and post-trial hearings . . . . These hearings result in an enormous drain in available court resources, resources which would otherwise be available for handling the trial of criminal cases.[294]

On the other hand, Judge John Feikens attributed a portion of the problem to a practice he termed "indictment overkill":

> [T]he Congress should consider ways in which the Department of Justice could be limited in the bringing of cases in which there is indictment overkill, mainly in the unnecessary number of counts stemming from the same offense . . . . [A] favorite device on the part of the prosecution is . . . to indict all of the defendant [sic] alleged to be involved in the conspiracy . . . separately for the commission of substantive offenses and then to indict each defendant additionally as an aider and abetter in the commission of substantive offenses . . . .[295]

Judge Alfonso J. Zirpoli further accused the Justice Department of failing to expedite dismissals.[296] Perhaps this type of squabbling served to

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[292] *1974 Hearings* 160 (testimony of Senator Sam J. Ervin, Jr.).

[293] *Id.*

[294] *Id.* at 196-97.

[295] *Id.* at 240.

[296] *Id.* at 370. In hearings before the Senate Subcommittee on Constitutional Rights, the Justice Department argued that "unnecessary defense motions" were a significant cause of delay, while Gilbert Rosenthal, past President of the National Association of Criminal Defense Lawyers, accused some United States Attorneys of judge-shopping. 1974 S. REP. 9.

underscore the need for legislative action in the minds of those committee members who had to referee the exchanges.

Numerous other issues, including the constitutionality of speedy trial legislation,[297] the effect of the Act on guilty pleas,[298] and specific language in the Act,[299] were discussed in committee. One final question, however, merits individual treatment. Since the Act will require that increased attention be given to criminal cases to satisfy its provisions, several witnesses expressed concern over the residual effect on the trying of civil cases.[300] Judge John Feikens stated that in 1973 he spent 112 out of 185 trial days trying criminal cases and during the remaining days was able to devote actual trial time to only 3 civil actions.[301] He concluded:

> [I]f I apply the principles of S. 754 to my docket, I would have to devote even more time to criminal cases and I am afraid that this would mean that I would be devoting all of my time to criminal matters, to the exclusion of civil cases.[302]

Judge Feikens pointed out that the number of civil filings in his district, especially in the area of private civil rights cases, was increasing[303] and questioned whether judges should have to tell civil litigants to "wait until we dispose of our criminal docket."[304] Similarly, Judge Alfonso J. Zirpoli testified that the difficulty incurred in processing civil cases in some jurisdictions has forced some courts "to declare a virtual moratorium on civil cases."[305] Congressman Cohen suggested that a solution might exist in an increase of court facilities and judges to allow

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[297] *1974 Hearings* 351 (statement of Ben R. Miller, Chariman, ABA Section on Criminal Justice); *id.* at 170-71 (testimony of Senator Sam J. Ervin, Jr.).

[298] Witnesses were concerned that defendants would all demand trial in an attempt to take advantage of the mandatory dismissal provisions. *E.g., 1974 Hearings* 197 (statement of W. Vincent Rakestraw, Assistant Attorney General, Office of Legislative Affairs). *But see 1974 Hearings* 170 (testimony of Senator Sam J. Ervin, Jr.).

[299] *E.g., 1974 Hearings* 178 (statement of Rowland F. Kirks, Director, Administrative Office of the United States Courts); *1973 Hearings* 139 (statement of Dallin H. Oaks, President, Brigham Young University).

[300] *E.g., 1974 Hearings* 338 (testimony of Ivan E. Barris, attorney-at-law, Detroit, Michigan); *id.* at 212 (testimony of James L. Treece, United States Attorney for Colorado).

[301] *Id.* at 239 (statement of Honorable John Feikens, Judge, United States District Court, Eastern District of Michigan).

[302] *Id.*

[303] *Id.*

[304] *Id.* at 243 (testimony of Honorable John Feikens, Judge, United States District Court, Eastern District of Michigan).

[305] *Id.* at 370 (oral remarks of Honorable Alfonso J. Zirpoli, Judge, United States District Court, Northern District of California).

the trial of criminal and civil cases simultaneously.[306] Whatever the eventual solution, if indeed one is required, this testimony emphatically accentuates that implementation of the Speedy Trial Act will require the cooperation and imagination of every participant in the federal criminal justice system. An analysis of pertinent sections within the Act is required to understand fully the basis for this conclusion.

A. Time Limitations

Section 3161(a) provides that as soon as practicable after a defendant is charged, the trial judge must, after consultation with both parties, establish a trial date.[307] The purpose of this section is to put counsel for the government and defense on notice that the trial will commence within a specified time.[308] Both defendants and prosecutors alike should heed the legislative admonishment that

> [t]he time scheduled for trial is more than just a target date; it is a strong admonition to all parties to plan their schedules accordingly so that delay based on the unavailability of witnesses, inadequate preparation, and scheduling conflicts due to other commitments will not jeopardize the disposition of the cases . . . .[309]

The Act requires that all defendants charged with criminal offenses be brought to trial within 100 days of arrest or service of summons.[310] The ultimate time limits are divided into three procedural periods: (i) 30 days between arrest and indictment or information;[311] (ii) 10 days between indictment and arraignment;[312] and (iii) 60 days between arraignment and trial.[313] These time limitations will not, however, go into

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[306] *Id.* at 219.

[307] 18 U.S.C.A. § 3161(a) (Supp. 1976). Trial must be set on a "day certain" or listed for trial on a weekly or short-term calendar. *Id.* "The words 'short-term calendar' are not intended to mean a period of duration of more than one week, although it may be a period of less than a week." 1974 H.R. REP. 29.

[308] 1974 H.R. REP. 28.

[309] *Id.* at 29.

[310] 18 U.S.C.A. §§ 3161(b), (c) (Supp. 1976). *See also* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL § 2.1 (Approved Draft, 1968) [hereinafter cited as ABA STANDARDS]; SECOND CIRCUIT RULES REGARDING PROMPT DISPOSITION OF CRIMINAL CASES 4 (1971) [hereinafter cited as 2D CIR. R.].

[311] 18 U.S.C.A. § 3161(b) (Supp. 1976).

[312] *Id.* § 3161(c).

[313] *Id.* Two periods of potential delay fall beyond the scope of the Act: (1) appellate proceedings and (2) time between verdict and sentencing. The purposes of the Act are not thwarted in the first instance since "it is trial delay, not appellate delay, which has most seriously undermined the deterrent value of the criminal process." 1974 S. REP. 7. More-

effect until July 1, 1979. During the interim, the following time standards will apply:[314]

Effective Date	July 1, 1976	July 1, 1977	July 1, 1978
Arrest to Indictment	60 days	45 days	35 days
Indictment to Arraignment	10 days	10 days	10 days
Arraignment to Trial	180 days	120 days	80 days

Also during the interim, each district court is required to devise a plan for disposition of cases involving defendants in custody awaiting trial and defendants released pending trial who have been designated "high risk."[315] The Act accords such cases priority status[316] and requires that trial begin within 90 days from the start of continuous custody or from the date of "high risk" designation.[317] A failure to start trial within 90 days will, under specified circumstances, result in the release of a detainee or modification of the terms of release applicable to a "high risk defendant."[318]

Both the prosecutive intervals and the duration of the phase-in period were subjects of extensive discussion and amendment during the committee phase of the Act. As originally introduced, S. 895 mandated trial within 60 days of arrest or indictment.[319] The Justice Department initially proposed to amend the 60-day period to 180 days[320] and further to activate the time requirment for trial upon arraignment rather than indictment.[321] The Department contended it would be a waste of valuable judicial resources to require the scheduling of trials when an indictment was filed because a defendant could elect to plead guilty or nolo

over, the Federal Rules of Criminal Procedure require sentencing "without unreasonable delay." FED. R. CRIM. P. 32(a)(1).

[314] 18 U.S.C.A. §§ 3161(f), (g) (Supp. 1976).

[315] 18 U.S.C.A. §§ 3164(a)(1), (2) (Supp. 1976). "[T]he words 'high risk' should be construed to mean a high risk that the defendant will not appear for trial." 1974 H.R. REP. 39.

[316] 18 U.S.C.A. § 3164(a) (Supp. 1976).

[317] *Id.* § 3164(b).

[318] *Id.* § 3164(c).

[319] S. 895, 93d Cong., 1st Sess. § 101, ch. 208, § 3161(b)(1) (1971).

[320] Letter from Assistant Attorney General William H. Rehnquist to Senator Sam J. Ervin, Jr., Oct. 19, 1971, reprinted in *Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 251 (1971).

[321] *Id.* at 252.

contendere.[322] The House Subcommittee on Crime acquiesced and substituted the present language to require trial within 60 days of arraignment as opposed to arrest or indictment.[323] A further amendment provided for the 10-day span between indictment and arraignment but prompted a warning that

> [t]his provision is not intended to give the attorney for the Government the discretion to extend the time for arraignment beyond 10 days where the defendant's presence [can be] obtained by the exercise of prosecutorial initiative.[324]

As previously indicated, time requirements established by the Act will be phased in over a period of 3 years. The Act's prime mover, Senator Sam Ervin, agreed that a period of that duration was desirous, admitting that the 7-year phase-in proposed in S. 754 was the result of compromise with the Justice Department.[325] Although the time limits are implemented on a time-table basis, it is clear that Congress expects the courts to effectuate even shorter requirements if possible.[326] Despite the presence of some dissatisfaction with a lengthy phase-in period,[327] such an approach is necessary "so that we are not going to wake up on July 1, 1976, with the judges up against the wall on the time limit."[328] During these 3 years, the courts should make an exerted effort to insure that each year results in an increase in efficiency of the court system reflected in a greater ability to facilitate the processing of criminal cases.

The final time limitations contained in the Act relate to retrials. If a pending indictment is dismissed pursuant to a motion by the defendant and he is subsequently indicted for the same offense, the time limits applicable to the original indictment apply in full force.[329] Where, however, the trial judge declares a mistrial or orders a new trial, the trial must begin within 60 days "from the date the action occasioning the retrial becomes final."[330] If retrial follows an appeal or collateral attack by the defendant, the court is vested with discretionary authority to

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[322] *Id.*

[323] 1974 H.R. REP. 9-10.

[324] *Id.* at 31.

[325] *1974 Hearings* 168 (testimony of Senator Sam J. Ervin, Jr.).

[326] *Id.*

[327] *E.g., id.* at 233 (testimony of Charles Morgan, Jr., Director, Washington Office, A.C.L.U.).

[328] *Id.* (remarks of Representative John Conyers, Jr.).

[329] 18 U.S.C.A. § 3161(d) (Supp. 1976). *See also* ABA STANDARDS § 2.2(b), Commentary at 24.

[330] 18 U.S.C.A. § 3161(e) (Supp. 1976). *See also* ABA STANDARDS § 2.2 (c), Commentary at 25; 2D CIR. R. 6.

extend the 60-day retrial period up to 180 days if it is impracticable to comply with the 60-day provision.[331]

By defining the defendant's right to speedy trial in terms of a specified number of days, the Act departs from the approach taken by most lower courts when discerning the sixth amendment guarantee.[332] The length of delay, while only one factor in the *Barker* balancing test, takes on new importance, as delay beyond a certain date may prove fatal to the government's case. While the *Barker* Court found "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days," its finding rested on a hesitancy "to engage in legislative or rulemaking activity."[333] Thus, the opinion can be read as an invitation to Congress to take exactly the course it followed by enacting the Speedy Trial Act.

B. Excludable Delays

The time limits imposed by the Act are tolled by hearings, proceedings, and necessary delays which normally occur prior to the trial of criminal cases. Many of the exclusions from the running of time prior to trial are intended to insure that "the rights of the individuals to a complete and full hearing are not trampled under in the headlong rush for the disposition of a trial."[334] The Act excludes from the computation of time required to secure an indictment or to commence trial any period of delay allocable to: (1) examination and hearing on the defendant's mental or physical capacity;[335] (2) examinations concerning civil commitment of addicts and treatment for alcoholism;[336] (3) trials with respect to other charges;[337] (4) interlocutory appeals;[338] (5) hearings on pretrial motions;[339] and (6) hearings with respect to transfer for plea and sentence.[340] A further provision excludes the time during which "any

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[331] 18 U.S.C.A. § 3161(e) (Supp. 1976).

[332] The lower courts have consistently held that the length of a delay alone is insufficient to support a speedy trial claim. *E.g.*, United States v. LaBorde, 496 F.2d 965, 967 (6th Cir. 1974) (21 months until brought to trial); United States v. Spoonhunter, 476 F.2d 1050, 1057 (10th Cir. 1973) ("The mere passage of time does not . . . establish an unconstitutional denial of a . . . speedy trial.").

[333] Barker v. Wingo, 470 U.S. 514, 523 (1972).

[334] *1974 Hearings* 338 (testimony of Ivan E. Barris, attorney-at-law, Detroit, Michigan).

[335] 18 U.S.C.A. § 3161(h)(1)(A) (Supp. 1976). *See also* ABA STANDARDS § 2.3(a), Commentary at 26; 2D CIR. R. 5(a).

[336] 18 U.S.C.A. § 3161(h)(1)(B) (Supp. 1976).

[337] *Id.* § 3161(h)(1)(C).

[338] *Id.* § 3161(h)(1)(D).

[339] *Id.* § 3161(h)(1)(E).

[340] *Id.* § 3161(h)(1)(F).

proceeding concerning the defendant is actually under advisement."[341] The House Subcommittee on Crime limited such time to 30 days at the behest of a Detroit defense attorney, who suggested that a period of 30 days

> *after all oral argument is heard and all briefs have been submitted in the matter under advisement* is not an unreasonable period in which the district judge could act . . . . [I]f such a provision or restriction were written into the act, it would effectively plug up one of the loopholes . . . whereby a district judge . . . could well "sit on a matter" for an indefinite period of time . . . .[342]

This provision should not be interpreted to preclude the court's continuation of a case where additional time is needed due to the complexity or unusual nature of the proceedings.[343]

Additional exclusion provisions insure a degree of flexibility in the otherwise rigid time limits for the trial of criminal cases. These periods of delay include: (1) deferred prosecution by the government;[344] (2) the period during which the defendant is mentally or physically incompetent to stand trial[345] or is being treated for narcotics addiction or alcoholism;[346] and (3) "[a] reasonable period of delay when . . . defendant is joined . . . with a codefendant as to whom the time for trial has not run and no motion for severance has been granted."[347] The Act also exempts any period of time where the defendant or essential witness is either absent or unavailable.[348] In recognition of Justice Department contentions that the terms "absence" or "unavailability" in earlier legislation were too imprecise,[349] S. 754 was amended to include the following definitive language:

> [A] defendant or an essential witness shall be considered absent when his whereabouts are *unknown* and . . . he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due

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[341] *Id.* § 3161(h)(1)(G).

[342] *1974 Hearings* 340 (testimony of Ivan E. Barris, attorney-at-law, Detroit, Michigan) (emphasis added).

[343] 18 U.S.C.A. § 3161(h)(8) (Supp. 1976).

[344] *Id.* § 3161(h)(2).

[345] *Id.* § 3161(h)(4). *See also* ABA STANDARDS § 2.3(a); 2D CIR. R. 5(a).

[346] 18 U.S.C.A. § 3161(h)(5) (Supp. 1976).

[347] *Id.* § 3161(h)(7). *See also* ABA STANDARDS § 2.3(g); 2D CIR. R. 5(e).

[348] 18 U.S.C.A. § 3161(h)(3)(A) (Supp. 1976). *See also* ABA STANDARDS § 2.3(e), Commentary at 29; 2D CIR. R. 5(d).

[349] Letter from Assistent Attorney General William H. Rehnquist to Senator Sam J. Ervin, Jr., Oct. 19, 1971, reprinted in *Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 254 (1971).

> diligence . . . . [A] defendant or an essential witness shall be considered unavailable whenever his whereabouts are *known* but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.[350]

The government is saddled with the burden of going forward with the evidence to explain a delay under this provision.[351] The Attorney General's Office protested that with respect to the absence or unavailability of the defendant, this burden was "patently unfair."[352] While this contention is not wholly without merit, analysis of the statute precludes its viability. A literal interpretation of the statute requires that the government merely establish "due diligence" in attempting to secure the defendant's presence for trial. Since the accused is presumably aware of the trial date, he should be required to rebut the government's claims of "due diligence" by an affirmative explanation of his failure to appear. Further, the defendant must support a motion to dismiss for noncompliance with time periods established for starting the trial.[353] If the evidence indicates that he avoided prosecution, the motion should be summarily denied. The government could obviate any unfairness accruing from a less literal interpretation by immediately seeking a continuance when it becomes obvious that their best efforts to obtain the defendant's presence will fail. Under the statute, the court will be justified in granting the continuance to prevent a "miscarriage of justice,"[354] thereby excluding any further delay from the speedy trial computation.

C. Continuances

Any delay resulting from the continuance of a case by the judge on his own motion or at the request of either party will not be included in measuring the time required to indict or begin trial.[355] The Act, however, imposes stringent limitations by denying an exclusion unless

> the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweighs the best interest of the public and the defendant in a speedy trial.[356]

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[350] 18 U.S.C.A. § 3161(h)(3)(B) (Supp. 1976) (emphasis added). *See also* ABA STANDARDS § 2.3(e).

[351] 18 U.S.C.A. § 3161(a)(2) (Supp. 1976).

[352] *1974 Hearings* 201 (exhibit to testimony of W. Vincent Rakestraw, Assistant Attorney General, Office of Legislative Affairs).

[353] 18 U.S.C.A. § 3161(a)(2) (Supp. 1976).

[354] *Id.* § 3161(h)(8)(B)(i).

[355] *Id.* § 3161(h)(8)(A). *See also* ABA STANDARDS § 2.3(c); 2D CIR. R. 5(b).

[356] 18 U.S.C.A. § 3161(h)(8)(A) (Supp. 1976).

Further, the judge must signify in the record his rationale for finding that the requested continuance meets the above test.[357] The appellate courts should avoid a strict interpretation of this requirement. When the prosecution has otherwise complied with the Act's provisions, it would be unfair and in total disregard of the interests of society to dismiss an indictment because the trial judge neglected to make the appropriate record entry. If dismissal is deemed appropriate for that reason, it should be without prejudice to the government's case. The burden will ultimately fall on the defendant to establish that the delay resulting from a continuance should not be excused since he has the burden of supporting a motion to dismiss. A failure on the defendant's part to object at the time a continuance is granted should weigh heavily against him in the event a dismissal is sought.

In deciding whether to grant a continuance, the trial judge is instructed to consider several factors. One is whether a denial of a continuance would make it impossible to proceed with the case[358] or beget a "miscarriage of justice." For example, where through no fault of the defendant, counsel fails to prepare adequately or to obtain the presence of available witnesses, the defendant is not prohibited from obtaining a continuance.[359] The second is whether the complexity of the case forecloses adequate preparation for trial within prescribed time limits or precludes the return of an indictment by the grand jury.[360] While the statute does not attempt enumeration of the types of cases considered sufficiently complex to warrant continuance, the legislative history suggests that criminal prosecutions under the anti-trust, securities, or tax laws deserve special attention.[361] Although these considerations were not intended to be exclusive, the courts should not exploit their prerogative to consider other factors. Regardless of other considerations, a continuance will not "be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."[362] By prohib-

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[357] *Id.*

[358] 18 U.S.C.A. § 3161(h)(8)(B)(i) (Supp. 1976).

[359] 1974 H.R. REP. 33-34.

[360] 18 U.S.C.A. §§ 3161(h)(8)(B)(ii), (iii) (Supp. 1976).

[361] The time limitations under S. 895 did not apply to these types of cases. S. 895, 92d Cong., 2d Sess. § 101, ch. 208, § 3163(b) (1971). The Senate Subcommittee on Constitutional Rights deleted the exclusion after several witnesses criticized it as negating any incentive to accelerate disposition of these cases. Nevertheless, "complicated cases [will] still be subject to much more lenient time limits because unusual complexity would be the grounds for a continuance . . . ." 1974 S. REP. 5.

[362] 18 U.S.C.A. § 3161(h)(8)(C) (Supp. 1976). *But see* ABA STANDARDS § 2.3(b), Commentary at 27 (recommends excluding delay resulting from congested docket under "exceptional circumstances").

iting the granting of a continuance for institutional delays, Congress intended to provide an incentive to the prosecutors and courts to maximize the efficiency of available resources to insure that the defendant is tried within the prescribed time limitations.[363] General court congestion has been accepted by the majority of lower courts as an acceptable reason for delay.[364] It cannot be expected, therefore, that the legislative prohibition of continuance for that reason will be highly regarded by the judges. The bench can find solace in the fact that in the event calendar congestion cannot be alleviated through the use of available resources, the time limitations for trial may be suspended for up to 1 year.[365] During the suspension period, the time limit from arraignment to trial may be extended to a maximum of 180 days.[366]

D. Accused Prisoners

As previously indicated, special considerations arise when an accused is incarcerated within or without the jurisdiction in which charges are pending. To accommodate these considerations, the Speedy Trial Act provides a step-by-step procedure to ensure the presence of an accused prisoner at trial. The provisions are a reproduction of Standard 3.1 of the American Bar Association's *Standards Relating to Speedy Trial*.[367] The primary problem engendered by the legislative adoptation of these 1968 standards is that the standards themselves were written and approved prior to the Supreme Court's decisions in *Smith v. Hooey*[368] and *Dickey v. Florida*.[369] The Act evidently does not take these cases into account and, as will be seen, may prove inadequate in the event a defendant chooses to assert his constitutional right to a speedy trial.

Once the prosecutor becomes aware that an accused is incarcerated and serving a sentence pursuant to a prior conviction, he has two options: either immediately initiate procedures to secure the defendant's presence for trial[370] or file a detainer with prison officals exercising con-

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[363] 1974 H.R. REP. 33.

[364] *E.g.*, United States v. Latimer, 511 F.2d 498, 501 (10th Cir. 1975); United States v. Rodriguez, 510 F.2d 1, 3 (5th Cir. 1975); United States v. West, 504 F.2d 253, 256 (D.C. Cir. 1974); United States v. Joyce, 499 F.2d 9, 20 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974).

[365] 18 U.S.C.A. § 3174(b) (Supp. 1976).

[366] *Id.*

[367] ABA STANDARDS § 3.1.

[368] 393 U.S. 374 (1969).

[369] 398 U.S. 30 (1970).

[370] 18 U.S.C.A. § 3161(j)(1)(A) (Supp. 1976). *See also* 2D CIR. R. 5(b).

trol over the defendant.[371] When a detainer is filed, prison officials must inform the defendant of the charges and of his "right to demand trial."[372] Thereafter, if a demand is made, prison officials are required to so notify the prosecutor,[373] who must "promptly seek to obtain the presence of the prisoner for trial."[374] The only ultimate distinction between the two prosecutorial options is the existence of a demand for trial from the accused. In fact, the House Judiciary Committee drew this conclusion:

> In view of the fact that . . . section [3161(j)(2)] requires notice to the prisoner of the charges and establishes a procedure for demanding trial, the Committee feels it is unnecessary to require the attorney for the Government to proceed in those cases in which demand has not been made . . . .[375]

A simple example will illustrate that government reliance on this language may result in a court's finding of a failure to satisfy the "constitutional duty to make a diligent, good-faith effort"[376] to bring the defendant to trial. Suppose defendant *A* is indicted in State *X* and released on bail. While free on bail, *A* is convicted in State *Y* on another charge and confined. Subsequently, *A* writes the prosecuting attorney in State *X* inquiring about his case and in response, the prosecutor lodges a detainer with prison officials in State *Y*. At this point, the government has fully complied with the requirements of section 3161(j)(1)(B). Suppose further that prison officials in State *Y* neglect to inform the accused of the detainer and that he has a right to demand trial. Will *A* be allowed to languish in prison until he happens to learn of the detainer and demands trial? Certainly such a result would be inconsistent with the very purpose of the Act. The mere act of filing a detainer was found inadequate to satisfy constitutional prerequisites in *Dickey v. Florida*,[377] and if *A* could show prejudice to his defense and a sufficiently lengthy delay, the indictment in State *X* arguably should be dismissed under constitutional norms.

No plausible explanation is evident to justify requiring an accused prisoner to demand trial. The Act does not otherwise oblige a demand and clearly places the burden on the government to bring the defendant to trial within the prescribed time limitations. It is, therefore, wholly inconsistent to condition a prisoner's rights under the Act on the pres-

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[371] 18 U.S.C.A. § 3161(j)(1)(B) (Supp. 1976).

[372] *Id.* § 3161(j)(2).

[373] *Id.*

[374] *Id.* § 3161(j)(3). *But see* 2D CIR. R. 7 (no demand required).

[375] 1974 H.R. REP. 36.

[376] Smith v. Hooey, 393 U.S. 374, 383 (1969).

[377] 398 U.S. 30 (1970).

ence of a demand for trial. This is especially true when one considers that the prisoner's incarceration will not thwart the government's effort to satisfy the 60-day trial requirement because the time limits do not begin until "the prisoner's presence for trial on charges pending against him has been obtained."[378]

E. Sanctions

During the last several years, the most often debated aspect of speedy trial legislation has been the sanctions imposed for noncompliance with established time requirements. The provision of S. 754 requiring mandatory dismissal with prejudice in the event a defendant was not brought to trial as required[379] drew sharp criticism from the Justice Department.

> [M]andatory dismissal of criminal cases can only serve to injure the public by releasing persons charged with crime without an adjudication . . . of the case against them. This injures the public not only because the person may pose a danger to the public welfare, but also because it undermines the public's confidence in the criminal justice system to see persons charged with crime released without trial.[380]

The amended version of S. 754 which passed the Senate on July 29, 1974, mandated dismissal for noncompliance[381] but allowed reprosecution under "exceptional circumstances."[382] Senator Ervin later admitted that "Senate . . . opposition to [the] dismissal with prejudice provision was so intense that passage would have been impossible with such a provision."[383] During the 1974 hearings conducted by the House Subcommittee on Crime, virtually every witness commented on the amended dismissal provisions.[384] It should be evident that the sanctions imposed by the Speedy Trial Act of 1974 are essentially the product of political compromise.

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[378] 1974 H.R. REP. 36. *See also* ABA STANDARDS § 3.2, Commentary at 39.

[379] S. 754, 93d Cong., 2d Sess., § 101, ch. 208, § 3162 (1974).

[380] Letter from Elliot L. Richardson to Senator Sam J. Ervin, Jr., Oct. 11, 1973, reprinted in *Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773, and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 393 (1974).

[381] S. 754, 93d Cong., 2d Sess., § 101, ch. 208, § 3162(a)(2) (1974).

[382] *Id.* § 101, ch. 208, § 3162(b).

[383] *1974 Hearings* 161 (testimony of Senator Sam J. Ervin, Jr.).

[384] *E.g., id.* at 351 (statement of Ben R. Miller, Chairman, ABA Section on Criminal Justice); *id.* at 336-37 (statement of Ivan E. Barris, attorney-at-law, Detroit, Michigan); *id.* at 250 (statement of James E. Roberts, Chief Federal Defender, Federal Defender Office, Detroit, Michigan); *id.* at 239 (statement of Honorable John Feikens, Judge, United States District Court, Eastern District of Michigan).

Section 3162 of the Act provides that in the event the time limits of the bill, subject to the various exclusions, are not met, the court may dismiss the complaint, information, or indictment.[385] The effect of the dismissal will be determined from the court's balancing of several factors. In deciding whether to dismiss with or without prejudice, the court must consider

> the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.[386]

The defendant has the burden of supporting his motion to dismiss and a failure on the defendant's part to request dismissal "prior to trial" will result in a waiver of the dismissal remedy.[387] The dismissal sanction will not become effective until July 1, 1979,[388] and until that time no sanctions are provided for noncompliance. Presumably, however, the courts will be able to exercise their power under the Federal Rules of Criminal Procedure and dismiss for "unnecessary delay."[389] If the Act is to deter prosecutorial foot-dragging during the phase-in period, any delay in excess of prescribed time limitations must be termed "unnecessary" and, therefore, cause for dismissal.

The possibility of reprosecution after dismissal of charges is a serious flaw in the Speedy Trial Act. Not only will the defendant be subjected to further depletion of his financial resources and curtailment of his liberty, the process of subsequent indictment and retrial will perpetuate the delay condemned by the Act. The provisions excluding certain periods of delay and the phased implementation aspect provide sufficient safeguards against the numerous dismissals envisioned as endangering society. Yet even in the busier districts, the time required to try a defendant will rarely be of sufficient length to "trigger" an analysis of the remaining factors in the *Barker* balancing test. The defendant is, therefore, not only subject to reprosecution but is deprived of any legitimate chance to secure a dismissal under constitutional norms. Further, the incentive needed to ensure a good-faith effort on the part of prosecuting attorneys to adhere to established time sequences is surely dimin-

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[385] 18 U.S.C.A. §§ 3162(a)(1), (2) (Supp. 1976). Notice that the defendant need not move to dismiss when an indictment is not returned within prescribed time limitations. *Id.* § 3162(a)(1). Presumably, the burden rests with the government to dismiss the indictment in the event of noncompliance. *See also* ABA STANDARDS § 4.1, Commentary at 40; 2D CIR. R. 4.

[386] 18 U.S.C.A. §§ 3162(a)(1), (2) (Supp. 1976).

[387] *Id.* § 3162(a)(2).

[388] *Id.* § 3163(c).

[389] FED. R. CRIM. P. 48(b).

ished by inclusion of a nonprejudicial dismissal sanction. Realizing that these arguments are now academic, several suggestions are proferred with respect to the sanctions provided.

As mentioned, the right to dismissal is waived in the absence of a motion to dismiss made "prior to trial." To prevent additional delay that would result from a separate hearing, "prior to trial" should not be interpreted as prior to the actual day established for trial. The defendant should be required, however, to enter his motion before jury selection or proceedings on the merits are initiated. To protect the defendant and to protect his counsel from a potential malpractice claim, the court should explain to the defendant upon arraignment not only his rights under the Act, but that he will be required to move for dismissal in the event of noncompliance. Finally, in the event of a waiver, the court, upon consultation with counsel, should set a trial date as early as practicable to avoid further delay in the trial process.

In addition to the dismissal sanction, the Act vests discretionary power in the court to fine or suspend the attorneys involved in the trial of a criminal case. Exercise of the court's authority is predicated on a finding that counsel: (1) knowingly allows a trial date to be set without revealing that a witness will be unavailable on the day of trial;[390] (2) files a motion known to be frivolous for dilatory purposes;[391] (3) knowingly makes a false statement in order to secure a continuance;[392] or (4) willfully and without justification fails to advance to trial.[393] An appointed or retained defense counsel found to have committed one or more of the proscribed acts may be subjected to a 25 percent reduction in the compensation he would otherwise have received.[394] Under the same circumstances, a prosecuting attorney can be fined a maximum of $250,[395] banned from practicing before the court up to 90 days,[396] or reported to "an appropriate disciplinary committee."[397]

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[390] 18 U.S.C.A. § 3162(b)(1) (Supp. 1976).

[391] *Id.* § 3162(b)(2).

[392] *Id.* § 3162(b)(3).

[393] *Id.* § 3162(b)(4).

[394] *Id.* §§ 3162(b)(A), (B). The sanctions against defense counsel were suggested by the Justice Department. The Department contended that in light of the mandatory dismissal provisions, the sanctions were necessary to insure a "balanced bill." *1974* S. REP. 5.

[395] 18 U.S.C.A. § 3162(b)(C) (Supp. 1976).

[396] *Id.* § 3162(b)(D).

[397] *Id.* § 3162(b)(E). While the impetus for these provisions was cancelled by deletion of the mandatory dismissal requirement, they are viewed as a necessary supplement thereto. It is doubtful, however, that the sanctions will be invoked frequently because proof of willful infraction is required.

F. Implementation

The nation's district courts are assigned direct responsibility for assuring that the principles of the Act are put into practice. Every district court is directed to conduct "a continuing study of the administration of criminal justice" and to prepare a speedy trial plan.[398] Pursuant to the Act, the district court plans governing trial during the period from July 1, 1977, to July 1, 1979, must be submitted by July 1, 1976.[399] As mentioned, these interim plans may provide for time limitations shorter, but not longer, than those required by the Act. The court's permanent plan governing disposition of criminal cases after July 1, 1979, must be submitted by July 1978.[400] Permanent plans must provide for limits and sanctions in accordance with sections 3161 and 3162 of the Act. Each district plan will be reviewed and approved by a specified panel and forwarded to the Administrative Office of the United States Courts.[401] District plans are subject to modification upon approval of the review panel.[402]

The planning process is designed to accelerate the trial of criminal cases. The Act provides that the process

> shall seek to avoid underenforcement, overenforcement and discriminatory enforcement of the law, prejudice to the prompt disposition of civil litigation, and undue pressure as well as undue delay in the trial of criminal cases.[403]

Each district court is directed to employ a "planning group" to advise the district court throughout the planning process. Included as members of the committee are: The Chief Judge, a United States Magistrate, the United States Attorney, the district court clerk, the Federal Public Defender, the Chief United States Probation Officer for the district, a private defense attorney, and a reporter.[404] These groups are given the responsibility of formulating speedy trial plans and are authorized to utilize a portion of a $2,500,000 planning fund appropriated for that purpose.[405] In addition, the district court clerks are required to assemble and compile certain statistics[406] which will be made available to all

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[398] 18 U.S.C.A. § 3165(a) (Supp. 1976).
[399] *Id.* § 3165(e)(1).
[400] *Id.* § 3165(e)(2).
[401] *Id.* § 3165(c).
[402] *Id.* § 3165(d).
[403] *Id.* § 3165(b).
[404] *Id.* § 3168(a).
[405] *Id.* § 3171(a).
[406] *Id.* § 3170(a).

parties involved in the planning process.[407] While these procedures have been characterized as "cumbersome, time consuming, unrealistic, [and] unworkable,"[408] they seem to provide the type of systematic, detailed monitoring system needed to implement effectively this ambitious legislation. Congress should realize, however, that full implementation without deleterious side effects will be impossible without extensive supplemental legislation.

Senator Ervin argued in support of speedy trial legislation that "[t]he courts . . . cannot provide the additional resources to understaffed courts, prosecutors and public defender agencies by adopting rules of procedure."[409] Congress, by choosing to approach the speedy trial problem through the legislative process, must thereby commit itself to an unprecedented infusion of money and personnel into the federal criminal justice system.[410] Requests for an additional 52 district judgeships have gone unanswered since 1972 and it is estimated that 15 to 20 more judgeships will be needed to implement the speedy trial program.[411] Even at 1974 costs, the price of establishing these positions will exceed $16,848,000 for the initial year and at least $14,256,000 for every year thereafter.[412] Further, additional resources will be needed to support public defender programs as well as to enlarge clerical and administrative staffs. Congress should and must be willing to make this commitment if the Speedy Trial Act is to fulfill its promise.[413] Unless additional

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[407] *Id.* § 3170(c).

[408] *1974 Hearings* 378 (testimony of Honorable Alfonso J. Zirpoli, Judge, United States District Court, Northern District of California); *see id.* at 180 (statement of Rowland W. Kirks, Director, Administrative Office of the United States Courts).

[409] *Id.* at 160 (testimony of Senator Sam J. Ervin, Jr.).

[410] One criticism of speedy trial legislation is that it ignores one of the primary sources of court congestion—insufficient funding. *See* Letter from Chief Judge Edward M. Curran to Senator Sam J. Ervin, Jr., Oct. 7, 1970, reprinted in *Hearing on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 166 (1971); Letter from Judge Edward A. Robson to Senator Sam J. Ervin, Jr., Oct. 20, 1970, reprinted in *id.* at 193.

[411] Letter from Rowland F. Kirks to Maurice Barboza, Oct. 5, 1974, reprinted in *Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773, and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 195 (1974). *See also* Address by Mr. Chief Justice Warren Burger, State of the Federal Judiciary, ABA Convention, Feb. 15, 1976.

[412] "The approximate cost of the first year of a new district judgeship is $234,000. For each year thereafter the cost is approximately $198,000." Letter from William F. Foley to Maurice Barboza, Oct. 9, 1974, reprinted in *Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773, and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 195 (1974).

[413] Expenditures in support of the federal courts have seemingly held a low national priority. In 1970, Mr. Chief Justice Warren Burger amply illustrated this problem by

manpower and resources are provided, the Act will become an albatross around the neck of the federal criminal justice system.

The district court judges will, of course, be required to spend more time in the actual trial of criminal cases to cope with the requirements of the Act. One way to ensure the availability of needed time would be to expand the jurisdiction of United States Magistrates. Legislation is currently pending in Congress that would accomplish this goal. Pursuant to S. 1283, magistrates would be given increased authority to conduct evidentiary hearings on motions to dismiss or quash indictments and to suppress evidence in criminal cases. Further, S. 1283 would expand the magistrate's jurisdiction in civil cases, including conducting evidentiary hearings on habeas corpus petitions, motions for injunctive relief, and class action certification.[414] In addition to passing S. 1283, Congress should explore the possibility of allowing magistrates to accept guilty pleas in criminal cases. During fiscal year 1973, 87 percent of all criminal convictions in federal district court were by plea.[415] By allowing the magistrate to accept guilty pleas, a substantial amount of the district court judge's time would be available for the actual trial of criminal cases.[416]

These suggestions are by no means exhaustive. Others have insisted that Congress modify habeas corpus practices[417] and limit plea bargaining[418] if courts are to comply with the Speedy Trial Act. Regardless of the merits of these individual proposals, Congress must take the initia-

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comparing the $128 million annual appropriation to support the federal judicial system with the $200 million spent to develop the C-5A airplane. Address by Chief Justice Burger, State of the Federal Judiciary, ABA Annual Meeting, Aug. 10, 1970, reprinted in *Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 731 (1971).

[414] Letter from J. David Orlansky to William N. Reed, Jan. 7, 1976, on file with the *Mississippi Law Journal*. Mr. Orlansky is a full-time Magistrate for the United States District Court, Northern District of Mississippi.

[415] *1974 Hearings* 178 (statement of Rowland F. Kirks, Director, Administrative Office of the United States Courts).

[416] "[A]ny such legislation would have to be carefully drawn in order to assure that Magistrates do not perform functions which may be properly performed by an Article III Judge." Letter from J. David Orlansky to William N. Reed, Jan. 7, 1976, on file with the *Mississippi Law Journal*.

[417] *1974 Hearings* 198 (statement of W. Vincent Rakestraw, Assistant Attorney General, Office of Legislative Affairs) (pointing out that from 1970 to 1973 over 9,000 habeas petitions were filed annually). The Senate Judiciary Committee found that while the increase in habeas corpus petitions affected the workload of the courts, its impact on trial delay was insignificant. 1974 S. REP. 13.

[418] *1974 Hearings* 240 (statement of Honorable John Feikens, Judge, United States District Court, Eastern District of Michigan) (decision should be reached before trial date).

tive to enact supplemental legislation if defendants and society alike are to be relieved from the delays that occur every day in the courts.

Conclusion

The ultimate success or failure of the Speedy Trial Act will be determined during the next 3 years. During that time, district courts must activate and implement plans to accelerate the disposition of criminal charges and provide a speedy trial for those defendants desirous of having one. Courts throughout the federal system will have the opportunity to construe the Act and to weigh its ramifications. Undoubtedly, some provisions of the Act will bear up under such judicial scrutiny and others will not. The standards and duties established are by no means infallible. Questions have been raised with respect to the prosecutor's duty to an accused prisoner and his duty to ensure the presence of the defendant and essential witnesses at trial. The proper circumstances for granting a continuance and employing the dismissal sanction will require clarification. Hopefully the suggestions provided herein will contribute to the development of a consistent, realistic body of speedy trial decisional law. That must be the goal if society and criminal defendants are to reap the benefits intended by the Act.

Attorneys for the government and defense will likewise play an important role during the Act's embryonic stages. If simply to avoid a rash of unnecessary and possibly harmful dismissals, prosecutors should avoid multiple prosecutions while attempting to implement effective management techniques to maximize utilization of existing resources. Attorneys for both parties must desist from the dilatory tactics and pretrial manueverings that often lead to a series of protracted hearings. That is not to say that the procedural rights of any defendant should be sacrificed on the altar of speedy trial. It is suggested that the ambitious ends sought by the Act can be attained without subjecting defendants and their attorneys to a race for the courthouse.

Although many unnecessary delays will be eradicated through the complementary efforts of the courts and attorneys involved, Congress must provide needed financial resources and enact supplemental legislation. If either party neglects to bear their share of the burden, it will be a simple task to assign the blame for the delay and hardship which will surely result.

By establishing rigid time limitations, the Act may be criticized as too mechanical an approach to the speedy trial dilemma. The ad hoc approach of the courts under constitutional norms, however, has in many cases clearly denied rather than provided the defendant fulfillment of his speedy trial right. Not only have lengthy delays often passed

unredressed, but defendants have been saddled with the burden of showing actual prejudice to vindicate their rights. By implementing more definite standards not requiring any proof of prejudice, the Act relieves the accused of this intolerable burden and places the responsibility of insuring speedy trials in its rightful place—on the courts and prosecutors.

The birth of the Speedy Trial Act, whatever its consequences, does not signal the death of judicial interpretation of the sixth amendment guarantee. Questions concerning the defendant's burden of proof, the length of delay carrying a presumption of prejudice, and the continuous justification of delay on the basis of administrative backlogs require clarification. The Supreme Court should act to define more clearly what has been for more than 70 years an elusive right. Through the concerned efforts of Congress and the judiciary, society, as well as those accused of crime, will benefit from the expeditious handling of criminal cases. Without their efforts, all will continue to suffer under the weight of a clogged and inefficient judicial system.

THE HEARSAY RULE IN MISSISSIPPI: "OUT OF THE PRESENCE OF THE ADVERSE PARTY—IN THE PRESENCE OF THE ADVERSE PARTY"

Thomas R. Mason and Wayne Hengen***

One of the leading modern texts on the law of evidence defines hearsay as

> testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.[1]

The whereabouts of the party against whom the out-of-court statement is offered is not mentioned as a necessary element in determining what is, or is not, hearsay. Rather, the same text goes on to observe: "A remarkably persistent bit of *courthouse folklore* is the practice of objecting to out-of-court statements because not made in the presence of the party against whom offered."[2]

Obviously the author of that statement is unfamiliar with practice in the Mississippi courts where the *presence of the party against whom an out-of-court statement is offered* is not folklore at all. Quite to the contrary, it is a rule of evidence implemented in everyday trial practice. Mississippi courts have traditionally viewed hearsay as statements made *outside the presence* of the party against whom offered. Therefore, if the statement is made *in the presence* of the opposing party, the statement is often not considered hearsay at all, and may be admissible in many cases without further consideration.[3]

Rule 801 of the Federal Rules of Evidence, adopted after much study of the law of evidence in all the states and the federal courts and designed to represent the best choices among the various evidentiary rules, defines hearsay as:

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[1] C. McCormick, Law of Evidence § 246 (2d ed. E. Cleary ed. 1972) (footnote omitted) [hereinafter cited as McCormick].

[2] *Id.* at 586 (emphasis added).

[3] See text accompanying notes 5 through 22 *infra*.

> (a) Statement.—A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
> (b) Declarant.—A "declarant" is a person who makes a statement.
> (c) Hearsay.—"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[4]

Again, no mention is made of the whereabouts, at the time the statement was made, of the party against whom the statement is offered.

The inclusion in Mississippi of the factor of the presence or lack of presence of the party against whom the statement is offered, therefore, seems to deviate from more generally recognized definitions. The purpose of this article is to examine the historical source of Mississippi's hearsay rule and analyze its meaning and value.

The Mississippi Supreme Court has and does rely upon and apply the more generally accepted theses underlying the hearsay rule. In holding that a written advertisement should have been excluded as hearsay it stated:

> It is, of course, familiar learning that hearsay evidence is not admissible.
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> The general rule of the exclusion of the hearsay evidence is found in 20 Am. Jur. 400. Evidence, Sec. 452, as follows: "Hearsay evidence is inadmissible according to the general rule. Various reasons have been assigned for requiring the exclusion of this kind of testimony. The real basis for the exclusion, however, appears to lie in the fact that hearsay testimony is not subject to the tests which can ordinarily be applied for the ascertainment of the truth of testimony. It is said that a statement by hearsay is one made without the sanction of an oath and without the declarant being under a responsibility to answer for the crime of perjury in making a wilful falsification."
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> It is also pointed out in this text at p. 403, Sec. 455: "The general rule which excludes hearsay as evidence applies to written, as well as oral, statements. In other words, documentary evidence may be hearsay and inadmissible as such unless an exception to the hearsay rule renders the document admissible."[5]

In addition to this generally accepted view, the court on several occasions has relied upon the factor of the presence of the party against whom the out-of-court statement is offered.

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[4] FED. R. EVID. 801.

[5] Pevey v. Alexander Pool Co., 244 Miss. 25, 31, 139 So. 2d 847, 850 (1962).

I. Evolution of the Rule

The earliest Mississippi case raising the question of the party's presence or absence was *Presley v. Quarles*,[6] an action upon a promissory note given for the purchase of land. The plaintiff introduced the testimony of another witness who stated that he and the plaintiff had discussed the matter and that the plaintiff had described his agreement with the defendant.[7] The court held that the declarations of the plaintiff when the defendant was not present were hearsay, and therefore inadmissible:

> A party cannot introduce his own declarations as evidence, *unless it be clearly shown that they were made in the presence and hearing of the other party*; and if they are thus admitted, the jury will not be justified in giving them any weight whatever.[8]

Presley has since been cited with approval.[9]

This concept of hearsay later appears to originate in part from the application of agency law in Reconstruction-era cases.[10] In 1870, Mr. Justice Tarbell delivered the opinion in *Clarke v. Edwards*.[11] The plaintiff, Clarke, had sued in trover for 15 barrels of whiskey which the plaintiff had consigned to general merchants. By the terms of the consignment the merchants were to sell the whiskey for cash only, but being in financial difficulty they pledged five of the barrels of whiskey to secure a note payable to the defendant. The defendant asserted his right to the property based upon representations by the consignees.[12] The court noted:

> Most assuredly, the true owner cannot be deprived of his own by the mere idle, unsworn, unsupported, if not untruthful, and unauthorized statements of an agent, himself financially embarrassed, and struggling to save his from bankruptcy . . . .[13]

The only authorities cited dealt with agency, bailment, and sales law.[14]

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[6] 31 Miss. 151 (1856).

[7] *Id.* at 151-52.

[8] *Id.* at 151 (emphasis added).

[9] Bullard v. Citizens Nat'l Bank, 177 Miss. 735, 742, 171 So. 540, 541 (1937).

[10] It may be interesting for some skeptics to know that vestiges of Reconstruction-era law remain alive in Mississippi.

[11] 44 Miss. 778 (1870).

[12] *Id.* at 786-87.

[13] *Id.* at 788.

[14] *Id.*, *citing* J. Story, Law of Agency § 78, at 113 (6th ed. 1863); J. Story, Law of Bailments §§ 325-26 (6th ed. 1856); J. Story, Law of Sales § 104; and two cases dealing with similar agency problems, McCoy v. McKowen, 26 Miss. 487 (1853) *overruled*, Rich-

A year later in 1871, the court decided *Herron v. Bondurant & Todd*,[15] which involved out-of-court representations as to the ownership of personal property (mules). The case arose out of an attachment proceeding brought against the possessor of the mules. Herron, the claimant, was the true owner. The trial court allowed into evidence statements by persons not connected with the owner which were made in Kentucky, out of his presence. The statements were to the effect that he was in partnership with one Burbridge, whose creditor had attached the mules.[16] The Mississippi Supreme Court held that these statements were inadmissible to establish the interest of the debtor, emphasizing:

> There is not in the record the slightest intimation that the representations made in Kentucky as to the ownership of the mules, was by the authority, knowledge or sanction of Herron, or of S.G. Burbridge, nor is there any legal evidence to justify the conclusion of the jury. No man can be rightly deprived of his property on the unauthorized and unsanctioned representations of others, made hundreds of miles from the real parties in interest, without their knowledge. See Clark [sic] v. Edwards, 43 Miss. [sic] and authorities therein referred to.[17]

The rule is, then, also rooted in the law of agency, growing out of the authority of an agent to make statements for his principal. *Herron* shifted the orientation from agency law to the law of evidence while citing only the agency authorities relied upon in *Clarke*.

Eight years later in *Hall v. Clopton*[18] the court used more specific language in holding that the out-of-court, out-of-presence statements were inadmissible. Here suit was brought against the estate of one Houghton who had endorsed notes payable to the plaintiff after the notes were in default. The issue was whether sufficient consideration had been given for Houghton's endorsements. The plaintiff's husband, as her agent, had procured Houghton's endorsements. At trial the plaintiff's evidence of conversations between herself and her husband concerning the consideration was excluded.[19] The court affirmed that exclu-

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berger v. American Exp. Co., 73 Miss. 170, 18 So. 923 (1896); and Doe *ex dem.* Skipwith v. Robinson, 24 Miss. 688 (1852). The first syllabus in *Clarke* was thus entitled "Agency—Unauthorized Acts—Third Parties."

[15] 45 Miss. 683 (1871).

[16] *Id.* at 690.

[17] *Id.* In this case, the court constructed its syllabus under the topic of evidence: EVIDENCE—DECLARATIONS INCOMPETENT, when—Declarations and representations made against the interest of a party, in his absence, and without his authority, knowledge or sanction, are not binding on him, and cannot affect his interest.

Id. at 683.

[18] 56 Miss. 555 (1879).

[19] *Id.* at 559.

sion stating: "[W]e remark that it was not competent for Mr. and Mrs. Hall to testify as to what was said between themselves *in the absence of the defendant . . . .*"[20]

Next in the evolutionary line was *Long v. Griffith*,[21] a suit for a real estate agent's commission based upon the agent's claim that he had procured a buyer who was ready, willing, and able to purchase the property and that the defendant, owner of the property, had released the buyer.[22] The trial court had allowed into evidence statements by the potential purchaser of the property to his wife which indicated that he would have carried out the contract had not the property owner released him. It was held that such statements were inadmissible because the statements were not made in the presence of the party against whom the evidence was offered.[23]

The defendant's presence, as an element of Mississippi's hearsay rule, has also been encountered in criminal cases. In one case the defendant was convicted of killing her 10-day old baby.[24] The trial court had admitted testimony of statements made by the defendant's sister to the sheriff at the grave site while the defendant was in jail.[25] The court reversed, stating:

> [T]he court should not have permitted the officers to testify as to what Lizzie said with reference to the admission of guilt of Virginia, *when Virginia was not present when the statement was made* by Lizzie at the grave, but was then incarcerated in jail. This testimony was clearly inadmissible, pure hearsay, and was very injurious to the rights of Virginia Stubbs in the trial of her case, and for this error a new trial must be granted her.[26]

In a later criminal case[27] the court considered the admissibility of statements between a doctor and a sheriff concerning the medical examination of one of the defendants involved. The statements were held to have been properly excluded by the trial judge because they were made out of the hearing of the defendant.[28]

The most recent case examining this problem involved a claim under the uninsured motorist clause of an automobile policy.[29] On the

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[20] *Id.* (emphasis added).
[21] 113 Miss. 659, 74 So. 613 (1917).
[22] *Id.* at 667-68, 74 So. at 614.
[23] *Id.* at 669, 74 So. at 614.
[24] Walker v. State, 135 Miss. 422, 100 So. 9 (1924).
[25] *Id.* at 426-27, 100 So. at 9.
[26] *Id.* at 427, 100 So. at 9-10 (emphasis added).
[27] Smith v. State, 152 Miss. 114, 118 So. 710 (1928).
[28] *Id.* at 117, 118 So. at 711.
[29] State Farm Mut. Auto. Ins. Co. v. Stewart, 288 So. 2d 723 (Miss. 1974).

issue of whether the adverse driver had been uninsured, the plaintiff offered testimony of a conversation between the claimed uninsured driver and another person, which was admitted by the trial judge.[30] In holding this to be reversible error, the court cited *Hall v. Clopton*,[31] yet also quoted "[t]wo well known definitions of hearsay" which do not contain language concerning the presence or absence of the defendant:

> Two well known definitions of "hearsay" should be noted. One is that "by 'hearsay' is meant that kind of evidence which does not derive its value solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness has received his information."
>
> The other asserts that the hearsay rule "is that rule which prohibits the use of a person's assertion, as equivalent to testimony of the fact asserted, unless the asserter is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it."[32]

Mississippi, however, is not unique in placing significance on the presence or absence of the party. Courts in other jurisdictions have similarly held that statements made out of the presence of the party against whom the statements are offered are inadmissible as hearsay.[33]

It is well known that many trial judger throughout this state, to a great extent, base their rulings on hearsay objections on whether the party against whom the evidence is offered was present when the out-of-court statement was made. The precedents defining hearsay reflect that this position has support, at least in the definition of the rule. The issue therefore becomes whether the rule, as so defined, is useful and accurate.

II. The Other Rule—Presence of the Party Immaterial

The most eminent of our authorities on evidence addressed the problem in stating his opinion that the reports are full of erroneous rulings on the admission of evidence, particularly those resting upon the assumption that any conversations outside the presence of the adverse

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[30] *Id.* at 723-24.

[31] 56 Miss. 555 (1879). See text accompanying note 18 *supra*.

[32] *Id.* at 724-25, *quoting* S. Gard, 2 Jones on Evidence § 8:1, at 159 (1972).

[33] *See, e.g.*, Koeppel v. Koeppel, 208 S.W.2d 929 (Mo. Ct. App. 1948); Liuzzo v. McKay, 396 Pa. 183, 152 A.2d 265 (1959); Evans v. Boggs, 35 Tenn. App. 354, 245 S.W.2d 641 (1951); Winters v. Winters, 282 S.W.2d 749 (Tex. Civ. App. 1955); *cf.* Gertner v. Newrath, 49 A.2d 655 (D.C. Mun. Ct. 1946); Jones v. Blackburn, 75 Ga. 791, 44 S.E.2d 555 (1947).

party are inadmissible.[34] Another highly respected modern treatise states that the presence or absence of the party against whom the out-of-court statement is offered has significance only in a few particular situations: (1) when a party seeks to charge the other party with knowledge or notice by offering statements made in the latter's presence,[35] and (2) when a party offers a statement made in the presence of another party as an admission by silence on the basis that the latter party failed to deny the statement and thus "acquiesced in or adopted the statement."[36] A notable exception to the preceding situation is that silence may not constitute an admission in a criminal case, for such would be a violation of the fifth amendment's right to remain silent, and would undermine the explicit doctrine of *Miranda v. Arizona*.[37]

Other courts have spoken quite explicitly on the problem. The matter was well analyzed by the Illinois Supreme Court[38] when it reasoned:

> [T]his type of objection, frequently appearing in the trial records before this court, arises from a misconception of the rules of evidence, and a belief that any statement or conversation occurring in the absence of defendant is inadmissible. Such is not the law.
>
> While we are not clear as to the origin of this notion, it apparently is connected in some way with the hearsay rule. An examination of the basis for this rule will clarify the situation. . . . The fundamental purpose of the hearsay rule was and is to test the real value of testimony by exposing the source of the assertion to cross-examination by the party against whom it is offered. While the administration of an oath and the right of confrontation are also spoken of as necessary elements, the essential feature, without which testimonial offerings must be rejected, is the opportunity for cross-examination of the party whose assertions are offered to prove the truth of the act asserted. . . . (Wigmore on Evidence, 3rd ed. sec. 1361, et seq.; People v. Smuk, 12 Ill. 2d 360, 146 N.E.2d 32). If this requirement is met, with the exception of instances such as those where the silence of the defendant is claimed to constitute an implied admission, the presence or absence of the defendant is immaterial.[39]

The California Supreme Court has reached the same conclusion

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[34] *See* 6 J. WIGMORE, EVIDENCE §§ 265-72, 1361-62, 1766-90, (3d ed. 1940) (especially § 1773).

[35] MCCORMICK § 246, at 586. For example, see Smedra v. Stanek, 187 F.2d 892 (10th Cir. 1951) (remark in an operating room that the sponge count is off when offered to show negligence in leaving a sponge inside the plaintiff).

[36] MCCORMICK § 246, at 586.

[37] 384 U.S. 436 (1966).

[38] People v. Carpenter, 28 Ill. 116, 190 N.E.2d 738 (1963).

[39] 190 N.E.2d at 741.

when considering the problem in a 1920 case.[40] In an alienation of affections matter, involving the admissibility of conversations between the plaintiff and his alienated wife which were made out of the presence of the defendant, the court stated:

> [I]t is wholly immaterial whether the defendant was present or not. The competency of evidence of declarations or statements by a person other than the party to the action against whom they are introduced is not affected merely by the latter's presence or absence. If the evidence be not competent if the party against whom it is sought to introduce [sic] it was not present when the statements or declarations were made, no more is it competent if he were present.[41]

Other courts have also held that conversations outside the presence of the adverse party were not ipso facto rendered inadmissible.[42] It seems, therefore, that there are two schools of thought.

III. "Out of the Presence of the Adverse Party"

It is safe to suggest that most out-of-court statements offered into evidence which were made out of the presence of the party *are*, in fact, hearsay and admissible only if they qualify under one of the numerous exceptions to the hearsay rule. All judges and lawyers are aware of the existence of the numerous exceptions and of the requirement that the foundations for the exceptions be established to the court's satisfaction before the hearsay statements are admitted. The Mississippi Supreme Court has approved the admission of many statements made out of the presence of the adverse party when they qualified under one or more of the various exceptions. For example, the court has approved admission of spontaneous declarations as res gestae,[43] statements of unknown pickeeters on strike lines also as res gestae,[44] hospital records under the public documents exception,[45] confessions of co-conspirators,[46] and dying declarations.[47]

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[40] Adkins v. Brett, 184 Cal. 252, 193 P. 251 (1920).

[41] 193 P. at 252.

[42] *E.g.*, Director of Patuxent Inst. v. Daniels, 243 Md. 16, 221 A.2d 397 (1966); Morris Cohen & Co. v. Pennsylvania Coal & Coke Corp., 197 N.Y.S.2d 125, 10 App. Div. 2d 667 (1960).

[43] Merchants Co. v. Hutchinson, 186 So. 2d 760, 764 (Miss. 1966); Houston Contracting Co. v. Atkinson, 251 Miss. 220, 233, 168 So. 2d 797, 800-01 (1964).

[44] Masonite Corp. v. International Woodworkers of America, 215 So. 2d 691, 699 (Miss. 1968).

[45] City of Bay St. Louis v. Johnson, 222 So. 2d 841, 848 (Miss. 1969).

[46] Jones v. State, 189 Miss. 533, 537-38, 198 So. 555, 556-57 (1940).

[47] Dean v. State, 173 Miss. 254, 160 So. 584 (1935).

The Mississippi Supreme Court has likewise approved the admission of statements made out of the presence of the defendant which were not offered as hearsay statements[48] because they were part of the res gestae, a material element of the case itself,[49] or independently relevant facts.[50]

Thus, the court has approved the admission of many kinds of statements despite the absence of the party against whom they are offered. Little can be said for retaining the phrase. If applied properly, it is merely a part of the definition (sometimes) of hearsay, and the statements remain subject to all the exceptions to the rule. Nevertheless, emphasis on the phrase presents a danger of confusion and error at trials. The danger lies in the application of the words "in or out of the presence of the adverse party" as the determinative, with the result that rulings will turn solely on that factor. Such an application will inhibit analysis of whether a statement is hearsay and, if so, whether any exception applies. The trial judge usually does not have time for reflection and thoughtful analysis. When the objection is made that a statement was "made out of the presence of the defendant" and those words are a part of the very definition of hearsay, the trial judge may very well react by ruling solely on that factor and thereby err.

As suggested by the Illinois Court,[51] if the statement is hearsay it is so because it was made or written when the declarant was not subject to oath, to observation by the trier of fact, nor to cross-examination; it is neither more or less hearsay because it was made outside the presence of the party against whom it is offered. It is suggested that the factor is not helpful in analyzing the hearsay problems presented to trial courts. It may in fact be a hindrance to proper evidentiary rulings by causing trial judges to base their rulings upon the simplistic issue of the whereabouts of the party against whom the statements are offered, rather than upon a true analysis of the hearsay rule, its basis, and exceptions.

IV. "In the Presence of the Adverse Party"

As previously noted, statements made in the presence of a party

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[48] *See* Chambers v. State, 252 So. 2d 217 (Miss. 1971), *noted in* 43 Miss. L.J. 122 (1972).

[49] Archer v. Helm, 70 Miss. 874, 889-90, 12 So. 702, 706 (1893) (statement of defendant, charged with hiring a surveyor to settle a boundary dispute, that he did not want to survey the boundary because the line had been settled by agreement); Baldwyn v. Flash, 58 Miss. 593, 601 (1881) (writing which evidenced the surrender of goods).

[50] Handshoe v. Daly, 211 Miss. 189, 193, 51 So. 2d 230, 231-32 (1951) (statements concerning supply of materials not offered to prove the truth).

[51] People v. Carpenter, 28 Ill. 116, 190 N.E.2d 738 (1963). See text accompanying note 36 *supra*.

should be admissible only if they are: (1) offered to prove that the party by his silence, adoption, or acquiescence admitted the facts stated; or (2) to show the party's notice of some relevant matter by the statement.[52] By the most basic analysis it may be realized that statements made in the presence of a party can have only three effects on the outcome of the suit: First, it may favor the party, in which case the adversary would not offer it; secondly, it may neither favor nor injure the party, in which case it will usually be irrelevant or immaterial; thirdly, it may injure the cause of the party by the inference that the party either admitted the statements by failing to deny them or was on notice of the facts of the statement. It is, therefore, only in this last instance that the party's presence is a significant factor in the hearsay question. In most circumstances, statements offered into evidence and which were made in the presence of a party will be admissible as an admission or to prove notice.[53]

Although the new Federal Rules of Evidence specifically exclude admissions from being hearsay,[54] admissions are generally treated as exceptions to the hearsay rule.[55] The foundation necessary to qualify an admission by silence is the same in either case.

The Mississippi Supreme Court has adopted the concept of admissions as an exception to the hearsay rule and has fully explained the foundation required to qualify such statements. In *Anderson v. State*[56] the state offered testimony of its principal witness that he had, in the presence of the defendants, accused them of a shooting. The defendants objected to the statement as hearsay. The court explained the rule:

> It is the general rule that hearsay evidence is not admissible in evidence, though there are exceptions to the rule. If a party out of court accuses another of crime or makes statements against him, in the hearing of a third party, and the accused remains silent, or does not deny the accusation or statement affecting vitally his interest under certain conditions, the hearsay evidence of the third party as to the statement out of court is competent. *But it is permitted to go into the record as evidence only upon the presumption that the silence or failure to deny, on the part of the accused, is an admission.* The rule is aptly stated in Enc. of Ev. vol. 1, p. 367: "So the silence of a party when a statement is made in his presence, against his interest, and is heard and understood by him, and is made in such way as to call upon him to deny it,

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[52] See text accompanying notes 35 & 36 *supra.*

[53] *Id.*

[54] FED. R. EVID. 801(d)(2).

[55] MCCORMICK § 262.

[56] 171 Miss. 41, 156 So. 645 (1934).

> if untrue, and the facts are within his knowledge, and the statement is made under such circumstances as naturally to call for a reply, amounts to an admission of the truth of the statement made, and may be sufficient to establish the fact as against him . . . ." This record is barren of any effort to show what either of the defendants said or did when they were pointed out and identified as the guilty parties.[57]

Thus the court recognizes that silence in the face of an accusation can be an admission, but only if the proper foundation is laid so as to qualify the statement as an admission. The court reversed this case because the state had failed to show what the defendants said or did when they were faced with the accusation. Therefore, although the statement was made in the presence of the defendants, it was excluded.

The Mississippi court, in an ancient case, likewise exluded statements made in the presence of the defendant, offered to prove an admission by the defendant, where it was shown that he had no knowledge whatsoever concerning the subject matter of the statement.[58] In another criminal case a statement made to the defendant in a conversation which detailed the burglary for which the defendant was charged—to which the defendant remained silent—was held inadmissible because it did not qualify as an admission by silence.[59] In contrast, the court has approved reception into evidence of statements made in the presence of a party and which were not denied, as admissions by silence.[60]

It is clear from these cases that the fact that statements are made in the presence of the party is not magical; it does not render the statement ipso facto admissible. Such statements are admissible only if the foundation evidence indicates that the party heard and understood; that the physical circumstances and the relation of the actors were such that a reasonable person would have denied them; and most importantly that the party failed to deny them.[61] Only on such a basis are the statements admissible. The presence of the party is merely the threshold factor.

Again, the danger of misapplication exists in taking the rule as an absolute. The trial judge who understands the Mississippi rule as being

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[57] *Id.* at 47-48, 156 So. at 646-47 (emphasis added).

[58] Edwards v. Williams, 3 Miss. (2 How.) 846 (1838).

[59] Bridges v. State, 86 Miss. 377, 38 So. 679 (1905).

[60] Ford v. Byrd, 183 Miss. 846, 184 So. 443 (1938); State v. Farish, 23 Miss. 483, 493-97 (1852). However, the court has excluded self-serving hearsay statements made by an insured to an agent of the defendant insurance company in an action upon the insurance policy. Coahoma County Bank & Trust Co. v. Feinberg, 241 Miss. 381, 128 So. 2d 562 (1961).

[61] See text accompanying note 57 *supra*.

that statements made in the presence of a party are not hearsay, may tend to allow any such statements without proper consideration of the necessary foundation proofs. If, on the other hand, judges take the rule with the necessary grain of salt and recognize that such statements are admissible only after a proper foundation, there is no problem. It is understood, however, that some judges will continue to apply the definition as an absolute, without requiring the necessary predicate to make the admissions exception applicable.

It is suggested that the phrase, "statements made in the presence of the party against whom they are offered are not hearsay," is not helpful as part of the definition of hearsay nor in any other respect. Instead, it may often be misleading and damaging to fair and proper trials. Referring again to the general hearsay rule which the Mississippi Supreme Court has applied,[62] it should be recognized that statements, although made in the presence of the party, are still not subject to oath, and the declarant is not available for observation by the trier of fact nor subject to cross-examination. These truth-seeking tests are the essence of and reasons for the hearsay rule. Hearsay statements made in a party's presence are properly admitted under the existing law only if they qualify under the admissions exception or as notice to the party. The presence of the party makes absolutely no difference, unless the out-of-court statements are offered to show an admission by silence and traditional foundation requirements are met.

CONCLUSION

The rule as it exists is confusing in that it appears to be absolute but is in fact only partly true. Statements made out of the presence of the party are hearsay; nevertheless, they may be admitted under the numerous exceptions to the hearsay rule. Statements made in the presence of the party may nevertheless be excluded because they do not qualify under an exception to the hearsay rule. It is therefore submitted that the rule presents potential for error because of this confusion. Hearsay is hearsay and is inadmissible because it does not meet the time-honored safeguards. Hearsay is admissible *only* if the proper foundation is proven to bring it within an exception of the rule. This is true without regard to the whereabouts of the party. It is respectfully submitted that this clarification should be seriously considered.

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[62] See text accompanying notes 18 through 32 *supra*.

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COMMENTS

MISSISSIPPI LAW GOVERNING PRIVATE CONSTRUCTION CONTRACTS: SOME PROBLEMS AND PROPOSALS

TABLE OF CONTENTS

I. Mississippi's Present Law Governing Private Construction Contracts 439
A. *General Construction Liens* 439
1. Section 85-7-131 440
a. Notice Requirements 442
b. Rights to the Lien 443
2. Payment or Execution of the Lien
3. Disbursement of Contract Proceeds: The *Wortman & Mann* Standards 446
B. *Stop-Notice Provisions* 448
1. Sections 85-7-181 and 85-7-183 448
2. Stop-Notice and the General Construction Lien 451
3. Uncertainties Under the Stop-Notice 452
4. Limitations on Effectiveness of Stop-Notice 455
C. *Bond Provisions* 457
1. The Effect of Bonding 457
2. Enforcing the Bond 458
3. Limitations on Bonding 458
II. The Status of the Subcontractor in Other Jurisdictions 460
A. *Direct Lien Rights* 461
B. *Stop-Notice Rights* 462
C. *Retainage Funds* 463
D. *Mandatory Bonding* 465
E. *An Overview* 468
III. Proposals 469
Conclusion 474

The rights of contractors, subcontractors,[1] and materialmen[2] in private construction contracts[3] is one of the most frequently litigated issues in Mississippi. Under the typical construction contract either the owner of the property or a lending institution finances the project by advancing money to the prime contractor. Having procured labor or materials on credit from subcontractors and materialmen,[4] the prime contractor typically pays them when they have completed their work. For various reasons, however, a contractor may be unable to complete the job and pay the subcontractors and materialmen. Upon obtaining a substitute to complete the construction project, the owner or lender may have already advanced the prime contractor so much money that once the substitute is paid, insufficient contract proceeds remain to pay the debts owed by the original contractor to his subcontractors and materialmen. In this situation someone must bear the loss. More than likely the original prime contractor has become insolvent and any judgment against him would be of little value. As a result, either the owner will pay twice for the construction project or the subcontractors and materialmen must go unpaid.

The Mississippi Legislature has adopted a comprehensive statutory scheme[5] to safeguard the rights of the various parties to a private construction contract.[6] Because the regulatory scheme is purely statutory

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[1] The term "subcontractor" as used in this comment refers to persons who supply labor or materials or both for a construction project at the direction of the prime contractor and who are not in privity of contract with the owner.

[2] The term "materialmen" as used in this comment refers to persons who supply material only for a construction project at the direction of a prime contractor and who are not in privity of contract with the owner.

[3] Mississippi clearly distinguishes between public and private contracts and the rights of the various parties thereto. *Compare* MISS. CODE ANN. §§ 31-5-1 *et seq.* (1972) (public contracts), *with id.* §§ 85-7-13 *et seq.* (private contracts). The chief reason for the distinction is that no lien can arise on land or buildings owned by the state. *See, e.g.*, Toler v. Love, 170 Miss. 252, 154 So. 711 (1934); Mississippi Fire Ins. Co. v. Evans, 153 Miss. 635, 120 So. 738 (1929); McKinnon v. Gowan Bros., 127 Miss. 545, 90 So. 243 (1922).

[4] Subcontractors and materialmen are notoriously careless in extending credit to prime contractors. Brown, *Mechanics' Liens: An Interpretation of Section 356 As Amended*, 37 MISS. L.J. 203, 225 (1966) [hereinafter cited as Brown I].

[5] MISS. CODE ANN. §§ 85-7-131 *et seq.* (1972). Due to the extensive discussion of the Mississippi statutory scheme which follows, all sections cited are provisions of the 1972 Mississippi Code unless otherwise indicated.

[6] This "comprehensive plan" has been a source of great confusion both for the construction industry and the legal profession. Brown I, *supra* note 4, at 203.

in nature, origin, and effect,[7] however, the parties to the contract must strictly comply with the act's requisites or they will not benefit from its protections.[8] The statutes basically provide three kinds of protections: general construction liens, stop-notice provisions, and bond provisions. This comment will examine these areas, discussing some of the major problems and uncertainties that presently exist in Mississippi's laws governing private construction contracts, and the authors will propose solutions to these problems.

I. Mississippi's Present Law Governing Private Construction Contracts

A. General Construction Liens

1. Section 85-7-131

A materialman's lien[9] is

> a claim created by law for the purpose of securing priority of payment of the price or value of the work performed and materials furnished in erecting or repairing a building or other structure, and as such attaches to the land as well as buildings and improvements erected thereon.[10]

As early as 1823 some form of materialman's lien existed in Mississippi, and the present statutory lien has undergone relatively little change since 1857.[11]

Section 85-7-131,[12] the basic general lien provision in Mississippi, provides that every building "erected, constructed, altered, or repaired" shall be subject to any debts owed for labor performed and materials furnished, the debts being a lien on such building. Thus, if the contractor or other protected party[13] is not paid by the owner for the construc-

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[7] *See, e.g.*, Wortman & Mann, Inc. v. Frierson Bldg. Supply Co., 184 So. 2d 857, 859 (Miss. 1966); Chancellor v. Melvin, 211 Miss. 590, 598, 52 So. 2d 360, 364 (1951); Pincus v. Collins, 198 Miss. 283, 284, 22 So. 2d 361, 362 (1945).

[8] Engle Acoustic & Tile, Inc. v. Grenfell, 223 So. 2d 613 (Miss. 1969).

[9] The term "mechanic's or materialman's lien" as used in this comment refers to the general construction lien set forth in Miss. Code Ann. § 85-7-131 (1972), and is not to be confused with any lien that arises under the Uniform Commercial Code.

[10] Black's Law Dictionary 1132 (rev. 4th ed. 1968).

[11] Brown I, *supra* note 4, at 206. This article presents an excellent history of Mississippi's lien laws.

[12] Miss. Code Ann. § 85-7-131 (1972).

[13] The term "protected party" in this comment refers to those persons under the general construction lien provisions of section 85-7-131.

tion done, the contractor may satisfy the debt out of the building itself.[14]

Section 85-7-131 stipulates how much of the owner's land may be "liable" to the contractor under the general lien procedure. If the structure is in the city, the lien covers the entire lot on which the building stands and the entire curtilage to which the building belongs. If the structure is not in the city, this section provides that the lien may be imposed on one acre of land on which the building may stand. Section 85-7-131 also describes what type structures are subject to this lien. It states that "any house, building, water well, or structure of any kind" shall be subject to the lien.

a. Notice Requirements

Under Section 85-7-131, constructive notice of the lien shall take effect as to bona fide purchasers or encumbrancers for value only from the time a suit is filed to enforce the lien,[15] or from the time the contract under which the lien arose, or notice thereof, is filed in the chancery clerk's office.[16] Thus, two methods for establishing constructive notice on the lien exist: (1) by filing suit to enforce the lien after the owner fails to pay for the labor, materials, or services furnished for construction; and (2) by providing notice of the lien by filing the construction contract in the chancery clerk's office.

Some problems exist, however, in this interpretation, for section 85-7-133 provides:

> Each of the several chancery clerks of this state shall provide in his office, as a part of the land records of his county, a book entitled "Notice of Construction Liens" wherein notices under section 85-7-131 shall be filed and recorded, and such liens, as provided hereunder, shall not take effect unless and until some notation thereof shall be filed and recorded in said book showing a description of the property involved, the name of the lienor or lienors, the date of filing, if and where suit is filed, and if and where contract is filed or recorded.

Section 85-7-133 thus requires that the notice for the "Notice of Construction Liens" book include: (1) a description of the property in-

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[14] For a discussion of the procedure for satisfying the debt out of the building, see text accompanying notes 27 through 38 *infra*.

Section 85-7-131 also subjects three other classes of property to the general construction lien: (1) fixtures, (2) railroad embankments, and (3) realty subdivisions. Since the thrust of this comment is directed at liens arising upon structures, further discussion of these additional classes of property is not warranted.

[15] See MISS. CODE ANN. § 85-7-141 (1972) for the procedure for commencing suit to enforce the lien.

[16] See *id.* § 85-7-139 for the procedure for filing the contract.

volved; (2) the name of the lienor; (3) the date of filing; (4) if and where suit is filed; and (5) if and where the contract is recorded.

This section appears to provide explicitly that *no* lien arising under section 85-7-131 may take effect until notice is filed in the "Notice of Construction Liens" book. But what does this do to the provision in section 85-7-131 which provides that such a lien may take effect "as to purchasers or encumbrancers for a valuable consideration" when the contract is filed and section 85-7-139 which provides for such recording of a construction contract in a manner similar to recording a deed? What about the stipulation in section 85-7-131 which provides that a lien may take effect when a suit to enforce the lien is initiated and section 85-7-141 which provides the procedure for instituting such a suit? In addition, there is the relatively small problem of section 85-7-261 which states that "unless otherwise provided"[17] the liens exist without any writing or recording.

The purpose of these various filing requirements is to provide notice to any party who may be affected by the construction lien. A good argument can therefore be made that filing in the "Notice of Construction Liens" book under section 85-7-133 should be and is the exclusive method of effectuating the general construction lien. Notice would be best achieved if there were one exclusive, designated place to file and check. One filing would remove the burden of having to hire an attorney to be sure that there is no lien. Even if an attorney's services are used, his time and perhaps his fees could be greatly reduced.

It may well be, however, that there is no presently existing solution for this dilemma in the lien laws.[18] The filing of a suit to enforce the lien could be a satisfactory alternative to filing notice in the "Notice of Construction Liens" book. It would seem that filing the contract under section 85-7-139 would certainly qualify as an alternative to the "Notice" book requirements. Nevertheless, until this problem is resolved, the safest approach is (1) to file the required notice in the "Notice of Construction Liens" book in accordance with section 85-7-133; (2) to file the contract itself under sections 85-7-131 and 85-7-139; and (3) to file lis pendens notice under section 85-7-197[19] as soon as the contract is entered. Although the three filings overlap, there is very little potential harm in doing all three, and doing so would seem to provide maximum protection under the law.

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[17] The term "unless otherwise provided" may eliminate potential problems under this section.

[18] Professor Brown blames these problems on careless legislative drafting. Brown I, *supra* note 4, at 206, 209, 214-15.

[19] For a discussion of lis pendens, see text accompanying notes 31 through 38 *infra*.

b. Rights to the Lien

A literal reading of section 85-7-131 affords the statutory lien to any person who "rendered services and constructed the improvement." This right, it would seem, could belong to any subcontractor or materialman as well as the prime contractor. Yet section 85-7-135 appears to require that a party be in privity with the owner in order to have a right to the lien. Section 85-7-135 provides:

> The lien declared in section 85-7-131 shall exist only in favor of the person employed, or with whom the contract is made to perform such labor or furnish such materials or render such architectural service, and his assigns, and when the contract or employment is made by the owner, or by his agent, representative, guardian or tenant authorized, either expressly or impliedly, by the owner.

It is obvious that sections 85-7-131 and 85-7-135 were meant to be read together, but they could be interpreted to be in direct conflict with each other.

Professor Brown discusses this problem in his article on mechanics' liens.[20] Brown explains that section 85-7-131 was amended in 1962, while section 85-7-135 was not. He speculates that the failure to amend section 85-7-135 was an oversight and urges that subcontractors of the prime contractor be accorded the status of lienors under section 85-7-131 irrespective of whether they contracted directly with the owner.

This interpretation is not necessarily correct, however, because a persuasive argument can be made that the two sections are consistent. Section 85-7-131 does not expressly give any lien rights to subcontractors, but rather speaks of contractors, materialmen, laborers, surveyors, engineers, and architects as having this right. Section 85-7-135 limits the lien to persons in direct privity with the owner. Any of the persons expressly listed in section 85-7-131 could be in direct privity with the owner, while a subcontractor by definition cannot be.[21] Another problem with Professor Brown's interpretation is the existence of the stop-notice provisions of section 85-7-181.[22] The stop-notice provisions provide the subcontractor with one means of protecting his right to payment. Arguably, then, the subcontractors and materialmen should not enjoy

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[20] Brown I, *supra* note 4, at 216-20.

[21] *See* Frazier v. O'Neal Steel, Inc., 223 So. 2d 661, 664 (Miss. 1969); Webb v. Blue Lightning Serv. Co., 237 Miss. 862, 870, 116 So. 2d 753, 755 (Miss. 1960).

[22] *But see* Brown, *Mechanic's Liens: Mississippi Notice Requirements*, 37 MISS. L.J. 385, 393-94 (1966) [hereinafter cited as Brown II]. For a detailed discussion of the stop-notice provisions, see text accompanying notes 51 through 100 *infra*.

the additional protection the general construction lien affords.[23] Under this view, section 85-7-135 is not only in harmony with section 85-7-131; it is a necessary complement to it. If this approach were followed, any of the parties expressly mentioned in section 85-7-131 could obtain a general construction lien when contracting directly with the owner.

In conclusion, one should assume that, under section 85-7-131, any person expressly listed in that section (contractors, materialmen, laborers, surveyors, engineers, and architects) who deals directly with and is in privity of contract with the owner of the property has the lien right, while those who are not in such privity probably do not have the right.

Until this issue is resolved, however, the diligent attorney for the subcontractor or materialman should assume that his client is protected by the general construction lien provisions of section 85-7-131 and file in the "Notice of Construction Liens" book. Although a subcontractor who files for protection under the general construction lien provisions could conceivably be liable to the owner under the negligence theory of slander of title,[24] this would require a judicial determination that subcontractors are not entitled to protection under section 85-7-131. The uncertainty concerning section 85-7-131's coverage, however, would seem to be an adequate defense for a filing subcontractor against such suit.[25]

2. Payment or Execution of the Lien

Once the protected party has filed the appropriate notices to protect the lien under section 85-7-131, upon completion of the contract one of two things will occur: The contractor either will or will not be paid by the owner.

If the contractor or other protected party is paid, he should, if he protected his lien by filing a notice in the "Notice of Construction Liens" book or by filing the contract itself under section 85-7-139, satisfy the lien or contract of record by noting on his filing that the contract was completed and paid. The code does not impose this requirement on the protected party. Nevertheless, the prudent lawyer will probably take

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[23] A potential argument for the dual existence of both the general construction lien and the stop-notice provision in favor of the subcontractor and materialman is that the former would not protect the subcontractor when the owner does not pay for the contract while the latter protects him when the contractor does not pay.

[24] Slander of title consists of words or conduct which will bring or seem to bring into issue the right or title of another to a given parcel of property. Walley v. Hunt, 212 Miss. 294, 304, 54 So. 2d 393, 396 (1951).

[25] This assumption is based on the fact that in order for an action to arise for slander of title the claim of title must not only be false but also malicious. *Id.*

this step to protect his client.[26]

If the contractor or other protected party is not paid, he must take two basic steps to execute his lien rights, assuming he has appropriately filed in the "Notice of Construction Liens" book. The protected party should file suit in the proper circuit court and file lis pendens notice.

Section 85-7-141 requires the protected party to file suit in the circuit court of the county where the property is located. Under this section two requisites must be satisfied before the protected party may enforce the lien. First, the suit may not be brought in circuit court unless the debt exceeds $200.[27] The second limitation is that the suit must be brought within 12 months from the time the money became due under the contract. The parties to the contract have the right to establish a due date under the contract for payment and the 12-month period would run from this due date.[28] The time for payment as fixed by the contract cannot be extended, however, by a subsequent agreement between the parties in an attempt to extend the time for bringing suit.[29]

In addition to section 85-7-141, other statutes furnish guidance for the unpaid protected parties filing suit. Section 85-7-143 provides that "all persons having an interest in the controversy" must be parties to the suit. Presumably this includes anyone who has an actual or potential legal interest in the land in question.[30] Sections 85-7-145, -147, and -149, respectively, provide the rules on summons, defenses and counterclaims, and issues for the hearing. If judgment is given against the owner, section 85-7-151 provides that the land subject to the lien shall be sold with the proceeds to go toward the payment of the debt. Any extra proceeds that might come from the sale would appear to revert to the next lienholder on the property. If no such person exists, then the property owner is probably entitled to the excess. If the proceeds from the sale are insufficient to satisfy the debt, the lienholder could apparently sue the owner directly as in any breach of contract suit.[31]

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[26] Although there is no case in point, it is conceivable that an argument could be made that if the lien is not satisfied of record and if it causes some injury to the homeowner by placing a "cloud" on his title, the party protected by the lien could be liable in tort under a theory of negligence. *Cf.* MISS. CODE ANN. § 85-7-199 (1972).

[27] MISS. CODE ANN. § 9-7-81 (1972). If the debt is less than $200, section 85-7-265 provides for a similar procedure in Justice Courts.

[28] Burwell v. Planters Lumber Co., 220 Miss. 79, 85, 70 So. 2d 71, 74 (1954).

[29] Ehlers v. Elder, 51 Miss. 495, 499-500 (1875).

[30] Clearly the holder of a deed of trust to the property in question is a necessary party. *See* Bullock v. Hans, 208 Miss. 41, 43, 43 So. 2d 670, 671 (1949); Parsons v. Foster, 154 Miss. 363, 372-73, 122 So. 387, 389 (1929).

[31] In addition to basic property and contract law principles, this presumption can be inferred from a broad reading of section 85-7-151, which clearly provides that the loss of the lien suit does not bar a subsequent suit by the protected party directly against the

When a party files suit to enforce his lien, he must make a notation in the lis pendens records under section 11-47-3. This notice is mandatory in all suits affecting real property unless the claim asserted is based on a recorded instrument or enrolled judgment. In a procedure unique to the construction liens provisions, the protected party *may* file his lis pendens notice when the contract is first executed under the authority of section 85-7-197.

Unlike section 11-47-3, section 85-7-197 is an optional statute designed to give greater protection to a lienholder protected under section 85-7-131,[32] but the possibility exists that it may not achieve that purpose.[33] Ideally, the holder of the general construction lien has priority in the land to which the lien is subject over anyone acquiring a subsequent interest in the property who has notice, either actual or constructive, of the prior lien.[34] This pre-suit lis pendens of section 85-7-197 would serve as such constructive notice.[35] Constructive notice, however, may also be achieved by filing the contract under section 85-7-139[36] or presumably by filing notice in the "Notice of Construction Liens" book under section 85-7-133.

The protection afforded by section 85-7-197 through the early giving of notice, however, could possibly become a hindrance. This assertion is based upon a comparison of section 85-7-197 with sections 85-7-131, 85-7-133, and 11-47-3. The optional pre-suit lis pendens of section 85-7-197 provides that the owner's liability shall not exceed an amount greater than the original contract price, but no such requirement expressly exists under sections 85-7-131, 85-7-133,[37] or 11-47-3. Therefore, the subcontractor, especially where there are several lien claimants or where the cost of the construction project is legitimately higher than the contract price, could be limiting his ultimate recovery by attempting to give notice at the time of the contract's execution.

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owner to satisfy the debt. *But see* Federal Land Bank v. Thames Lumber & Supply Co., 160 Miss. 335, 134 So. 154 (1931).

[32] By allowing an earlier time for filing lis pendens, *i.e.*, when the contract was first executed, one must assume that section 85-7-131 was designed to give greater protection than that afforded by section 11-47-3.

[33] *See generally* Brown II, *supra* note 22, at 386 & n.10.

[34] Southern Life Ins. Co. v. Pollard Appliance Co., 247 Miss. 211, 221-22, 150 So. 2d 416, 421 (1963); Walker v. Macon Creamery Co., 165 Miss. 121, 129, 146 So. 442, 444 (1933). *But see* Jones Supply Co. v. Ishee, 249 Miss. 515, 521-23, 163 So. 2d 470, 472-73 (1964).

[35] *See* Southern Life Ins. Co. v. Pollard Appliance Co., 247 Miss. 211, 221-22, 150 So. 2d 416, 420-21 (1963).

[36] *Id.*

[37] *But see* Wenger v. First Nat'l Bank, 174 Miss. 311, 319, 164 So. 229, 230-31 (1935); Herrin v. Warren & Mobley, 61 Miss. 509, 515 (1884).

Although section 11-47-3 contains no express provision that the contractor may not recover more than the contract price from the owner, no judicial authority can be found entitling the contractor to excess recovery. Based on a presumption of statutory consistency, the sounder view would seem to be that the owner could not be liable beyond the contract price. Consequently, even though filing under section 85-7-197 may not, in theory, be in the protected party's best interests, the additional protection afforded by this optional lis pendens, when coupled with the fact that the court may likely impose a similar contract price limitation on the owner's liability under section 11-47-3, dictates the use of section 85-7-197.[38]

3. Disbursement of Contract Proceeds: The *Wortman & Mann* Standards

Traditionally, the person who acquires the rights to a general construction lien in a given parcel of property acquires rights inferior to all prior acquired and perfected rights in the property.[39] Thus, if a financial institution lends money to an owner to acquire land and in return acquires a recorded deed of trust on that land, any subsequently acquired construction lien on that land is normally inferior to the deed of trust. The landmark case of *Wortman & Mann, Inc. v. Frierson Building Supply Co.*,[40] however, establishes a method by which the general construction lien may become superior to those of the construction lender.

In that case Wortman & Mann, a loan company, agreed to advance money to a contractor for the construction of homes and the purchase of lots. In return the contractor-owner gave Wortman & Mann a deed of trust on the lots. A series of cash advances from Wortman & Mann to the contractor took place during the course of the construction, but little of this cash ever went to pay off subcontractors and materialmen on the construction projects. Subsequently, the contractor became overdue on his note, and Wortman & Mann foreclosed, purchasing the lots

[38] An interesting aspect of an owner's potential liability under the general lien provisions is seen in section 85-7-137. This section provides that if a tenant, without the express "written consent of the owner," authorizes certain construction, such authorization can subject the structure, but only the specific structure, to a construction lien. Thus, under the express authority of this section, the owner of the building in question could lose all his rights to the structure without giving his approval to, or having knowledge of, the alteration to the structure. Under section 85-7-143, however, the owner of the property in question must be a party to any suit to enforce a lien on the property.

[39] *See* Ziller v. Atkins Motel Co., 244 So. 2d 409, 411-13 (Miss. 1971); Tansil v. Horlock, 204 So. 2d 457, 462-63 (Miss. 1967); First Nat'l Bank v. Virden, 208 Miss. 679, 684-85, 45 So. 2d 268, 270-71 (1950).

[40] 184 So. 2d 857 (Miss. 1966).

at the foreclosure sale.

Several materialmen, including Frierson Building Supply Company, filed a petition to enforce a general construction lien on the property. The circuit judge held in favor of Frierson against the contractor and ordered that the property be sold to satisfy the judgment due Frierson. Wortman & Mann appealed, contending that its lien was paramount to Frierson's since Frierson's lien had not been properly perfected and that it had acted in a reasonable manner. The materialmen contended that their liens should be superior to Wortman & Mann's because it had failed to use reasonable diligence and care to ensure that the proceeds of the construction loan were used to pay materialmen in the construction.[41]

The Mississippi Supreme Court acknowledged that section 85-7-131 does provide a general construction lien for materialmen such as the appellees. Since the materialmen in this case, however, had made no effort to give notice to Wortman & Mann of their lien prior to the time it had advanced all the funds to the contractor, they lost the benefit of the lien. Nevertheless, the court stressed that a lender, in advancing construction funds to the contractor, must use reasonable diligence to see that the funds are in fact used in payment for materials or other costs of construction.[42] The court then held that Wortman & Mann had used reasonable diligence by: (a) requiring the contractor to give Wortman & Mann's attorneys an affidavit that he owed nothing for materials and labor at the time each cash advance was made; (b) by making regular trips to the chancery clerk's office to check the appropriate records in an effort to determine if the materialmen and subcontractors had perfected claims under section 85-7-131; and (c) by not having received notice from the materialmen that they were not being paid.[43] The court then pointed out that the materialmen had no liens superior to Wortman & Mann's interest. The standards set forth in this case would thus seem to be the only safe guideline for the disbursement of contract funds in a private construction contract.[44]

The Mississippi Supreme Court has also provided guidance in other important areas under the general construction lien provisions. For ex-

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[41] *Id.* at 857-59.

[42] *Id.* at 859-60.

[43] *Id.* at 860-61.

[44] This assumption is based on the fact that the *Wortman & Mann* court imposed a duty of reasonable diligence on the disburser of contract proceeds, and, to date, subsequent decisions have measured reasonable diligence against the *Wortman & Mann* standards. *See* Bankers Trust Sav. & Loan Ass'n v. Cooley, 362 F. Supp. 328, 332-33 (N.D. Miss. 1973); Tansil v. Horlock, 204 So. 2d 457, 463 (Miss. 1967).

ample, the lien has long been liberally construed in favor of the protected party.[45] The contract out of which the lien arises need not be in writing,[46] nor does the protected party waive any right to the lien merely by taking a promissory note[47] or additional security[48] from the owner. Furthermore, the lien does not arise on public buildings,[49] nor does it arise unless the contract is completed.[50]

B. Stop-Notice Provisions

1. Sections 85-7-181 and 85-7-183

A stop-notice is a method by which a subcontractor, materialman, or laborer of the prime contractor may force any undisbursed funds under the original contract which the owner may owe the prime contractor into a type of escrow account[51] for his own payment.

The provisions for stop-notices are found in sections 85-7-181 and 85-7-183. Section 85-7-181 provides in part:

> When any contractor or master workman shall not pay any person who may have furnished materials used in the erection, construction, alteration, or repair of any house, building, structure, fixture, boat, water craft, railroad, railroad embankment, the amount due by him to any subcontractor therein, or the wages of any journeyman or laborer employed by him therein, any such person, subcontractor, journeyman or laborer may give notice in writing to the owner thereof of the amount due him and claim the benefit of this section; and, thereupon the amount that may be due upon the date of the service of such notice by such owner to the contractor or master workman, shall be bound in the hands of such owner for the payment in full, or if insufficient then pro rata . . . .

This part of the statute basically provides that when any contractor does not pay any person who has furnished materials or labor at the construction project, then that person may provide the owner with written notice of the contractor's failure to pay. Upon the giving of such

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[45] *See, e.g.*, Sharpe v. Spengler, 48 Miss. 360, 363 (1873); Weathersby v. Sinclair, 43 Miss. 189, 195-96 (1870); Buchanan v. Smith, 43 Miss. 90, 101-02 (1870).

[46] *See, e.g.*, Taylor v. Murphy, 203 So. 2d 82, 83 (Miss. 1967); Delta Lumber Co. v. Wall, 119 Miss. 350, 355, 80 So. 782, 783 (1919).

[47] Bullock v. Hans, 208 Miss. 41, 44-45, 43 So. 2d 670, 671 (1949).

[48] *See* Smith & Vaile Co. v. Butts, 72 Miss. 269, 270, 16 So. 242, 243 (1894); Parberry v. Johnson, 51 Miss. 291, 296-97 (1875).

[49] Toler v. Love, 170 Miss. 252, 258-59, 154 So. 711, 713-14 (1934); Mississippi Fire Ins. Co. v. Evans, 153 Miss. 635, 652-53, 120 So. 738, 744 (1929).

[50] King v. Hankins, 209 So. 2d 190, 191 (Miss. 1968).

[51] *See* Brown II, *supra* note 22, at 388.

notice, the amount that may be due the prime contractor will be frozen in the hands of the owner, or essentially placed in escrow, for full or partial payment to the subcontractor. Under this part of the section, when an owner receives a stop-notice, any further payments on the contract should not be made until the prime contractor has satisfied his obligation to the subcontractor who filed the stop-notice.[52]

If, after having given the stop-notice to the owner, the prime contractor is unable to pay the protesting subcontractor, there are two ways in which the subcontractor may acquire his part of the proceeds from the "escrow account." Section 85-7-181 provides:

> [I]f after such notice, the contractor or master workman shall bring suit against the owner, the latter may pay into court, the amount due on the contract; and thereupon all persons entitled hereunder, so far as known, shall be made parties and summoned into court to protect their rights, contest the demands of such contractor or master workman and other claimants; and the court shall cause an issue to be made up and tried and direct the payment of the amount found due in accordance with the provisions hereof . . . .

This portion of section 85-7-181 essentially permits the owner to interplead[53] the contract proceeds into court when confronted with demands for payment from both the prime contractor through suit and the subcontractors or materialmen through a stop-notice.

Section 85-7-181 also provides a second means of access to the "escrow account" for the subcontractor or materialman:

> [I]n case any person entitled to the benefits hereof, shall sue the contractor or master workman, such person so suing shall make the owner and all other persons interested, either as contractors, master workmen, subcontractors, laborers, journeymen or materialmen, so far as known, parties to the suit (and any such party not made a party in any suit hereunder authorized may intervene by petition), and, thereupon the owner may pay into the court the amount admitted to be due on the contract or sufficient to pay the sums claimed, and the court shall cause an issue to be made up and award the same to the person lawfully entitled . . . .

This part of the statute allows the subcontractor, materialman, or laborer to sue the prime contractor for the unpaid claim and is thus a direct approach to the escrow account for the subcontractor. Under this second method the owner again pays the contract proceeds into court

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[52] The owner could also issue a check payable to both the filing subcontractor and the prime contractor.

[53] *Cf.* Sadler v. Glenn, 190 Miss. 112, 199 So. 305 (1940).

for disbursement to the appropriate parties.

If the owner denies his obligation to the prime contractor under this direct approach to the "escrow account," the subcontractor *may* acquire a lien on the property in question similar to the general construction lien provided for by 85-7-131. To this effect section 85-7-181 further provides:

> [I]f the owner, when sued, with the contractor or master workman, shall deny any indebtedness sufficient to satisfy the sums claimed and all costs, the court shall, at the instance of any party interested, cause an issue to be made up to ascertain the true amount of such indebtedness and shall give judgment and award costs according to the rights of the several parties in accordance herewith. In case judgment shall be given against such owner, such judgment shall be a lien, from the date of the original notice, and shall be enforced as other liens provided in this chapter.

This same lien would seem to be created if the owner disregards the stop-notice and continues to pay the contractor.[54] Though the section does not expressly so provide, it implies that if the prime contractor does not pay the subcontractor filing the stop-notice, then the owner himself should pay him.[55]

Regardless of the method by which the subcontractor asserts his claim for the undisbursed contract funds, section 85-7-181 dictates that "[t]he owner shall not be liable . . . for a greater amount than the amount contracted for with the contractor."

Section 85-7-183 gives further protection to the stop-notice rights of the subcontractor by providing that

> [n]o contractor or master workman except as hereinafter provided, shall have the right to assign, transfer, or otherwise dispose of in any way, the contract or the proceeds thereof, to the detriment or prejudice of the subcontractors, journeymen, laborers, and materialmen as declared hereinbefore and all such assignments, transfers, or dispositions shall be subordinate to the said rights of the subcontractors, journeymen, laborers and materialmen, as well as the owner. Provided, how-

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[54] *Cf.* Williams v. Taylor, 216 Miss. 563, 569-70, 62 So. 2d 883, 885 (1953); McNair v. M.L. Virden Lumber Co., 193 Miss. 232, 245-47, 4 So. 2d 684, 686-87 (1941); City Coal & Lumber Co. v. Gulf Ref. Co., 184 Miss. 260, 265-66, 185 So. 250, 251 (1938). This could create havoc when one considers that the owner cannot be liable to anyone beyond the contract amount under section 85-7-181. A possible explanation is that the owner's limitation of liability to the amount of the contract is contingent upon his compliance with his duties under the statute.

[55] If the owner sought both protection and contract completion, he could possibly choose to satisfy the debt by making a check for the amount claimed by the subcontractor payable to both the subcontractor and the prime contractor. The owner could secure the greatest protection, however, by interpleading the disputed funds into court.

> ever, that this section shall not apply to any contract or agreement where the contractor or the master workman shall enter into a solvent bond conditioned as provided for in the following section.

Thus, if the prime contractor assigns his rights to the proceeds of the contract to a lending institution for the advancement of construction funds, the lender's rights to the contract proceeds are subordinate to the rights of the subcontractor and materialman.[56] This does not apply, however, to an owner who manages his own construction project, subcontracting various parts of the construction,[57] or to any construction undertaken on a bonded contract.

2. Stop-Notice and the General Construction Lien

Several similarities between the stop-notice provisions and the general construction lien are seen through a comparison of the various statutes. If the subcontractor is forced to file suit under section 85-7-181 and acquires a stop-notice lien on the property in question, the extent of the lien is the same as the general construction lien. Prior to bringing his suit to effectuate a lien under section 85-7-181, the subcontractor, just like the contractor under the general construction lien,[58] must file lis pendens notice under section 11-47-3 unless he has already filed such notice under the optional pre-suit lis pendens of section 85-7-197.[59] However, since the subcontractor's stop-notice lien usually has priority over only subsequently acquired rights in the property with notice of that lien,[60] and, unlike the general construction lienholder, since the subcontractor's rights are expressly limited in section 85-7-181 to the amount of the original contract,[61] the optional lis pendens notice of section 85-7-197 clearly should be filed as soon as the subcontractor enters his contract on the job with the prime contractor.[62] The suit to enforce the

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[56] Southern Life Ins. Co. v. Pollard Appliance Co., 247 Miss. 211, 224-25, 150 So. 2d 416, 422 (1963); Ladner v. Hogue Lumber & Supply Co., 229 Miss. 505, 511-12, 91 So. 2d 545, 547 (1957).

[57] Jones Supply Co. v. Ishee, 249 Miss. 515, 522-23, 163 So. 2d 470, 472-73 (1964).

[58] See text accompanying notes 32 through 38 *supra*.

[59] The right to file the optional lis pendens also imposes the duty of satisfying the lis pendens of record under section 85-7-199 and the potential penalty of section 85-7-201 should the lis pendens be falsely used.

[60] *See* Strangi v. Wilson, 223 Miss. 122, 141-45, 77 So. 2d 697, 703-05 (1955).

[61] See text accompaying notes 55 through 56 *supra*. This should be compared with the position of a lienholder under section 85-7-131 and related statutes. See text accompanying notes 32 through 38 *supra* for a discussion of section 85-7-131.

[62] It should be noted that section 85-7-197 could be interpreted to require that the subcontractor complete his work on the contract before he could use this provision. If this interpretation were followed, there would be no apparent difference between this section

stop-notice also appears to be limited to being brought within 1 year after the subcontractor's claim against the prime contractor becomes due.[63] The most important similarity is that the rationale of *Wortman & Mann, Inc. v. Frierson Building Supply Co.*[64] is equally applicable to the stop-notice lien rights of a subcontractor.[65] Its standards must therefore be met if a construction lender holding a prior acquired and recorded deed of trust on the liened land wants to maintain his priority over the subsequently acquired stop-notice lien rights of a subcontractor or materialman.

In the area of public contracts there is an important difference between the stop-notice provisions and the general construction lien. As is the case with the general construction lien,[66] the lien which may arise out of the stop-notice provisions does not apply to state-owned lands or buildings.[67] This does not mean, however, that the subcontractors of a prime contractor on a public contract are governed solely by public contract provisions.[68] If the prime contractor on a public contract is a private contractor and he subcontracts a portion of the contract to a private subcontractor or materialman, the undisbursed contract proceeds are subject to the stop-notice provisions of section 85-7-181 and 85-7-183 even though no lien may arise on the land involved.[69]

3. Uncertainties Under the Stop-Notice

First created in Mississippi in 1857, the stop-notice has been "the source of much dissatisfaction and confusion."[70] Because the provision functions as a lien by subrogation to the rights of the prime contractor to the contract proceeds,[71] the subcontractor has no right to the stop-notice unless the prime contractor is entitled to payment under the contract.[72] In a suit for the contract proceeds the burden is on the sub-

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and section 11-47-3. *Cf.* United States Fidelity & Guar. Co. v. Parsons, 154 Miss. 587, 122 So. 544 (1929).

[63] *See generally* Inerarity v. A.S. Wade & Co., 141 Miss. 552, 106 So. 828 (1926).

[64] 184 So. 2d 857 (Miss. 1966). For a detailed discussion of this case see text accompanying notes 40 through 44 *supra*.

[65] *See* Bankers Trust Sav. & Loan Ass'n v. Cooley, 362 F. Supp. 328, 332-33 (N.D. Miss. 1973); Tansil v. Horlock, 204 So. 2d 457, 463 (Miss. 1967).

[66] *See* note 3 *supra*.

[67] McGraw v. Board of Supervisors, 125 Miss. 420, 87 So. 897 (1921).

[68] Monroe Banking & Trust Co. v. Allen, 286 F. Supp. 201, 208 (N.D. Miss. 1968); Davis Co. v. D'Lo Guar. Bank, 162 Miss. 829, 844-45, 138 So. 802, 805 (1932).

[69] *Id.*

[70] Brown I, *supra* note 4, at 208.

[71] Chancellor v. Melvin, 211 Miss. 590, 599, 52 So. 2d 360, 365 (1951).

[72] *Id.* This may be a problem for the unpaid subcontractor where the prime contractor has abandoned the contract. Since the contractor has no lien rights until he completes

contractor to show (1) that the owner is indebted to the contractor under the contract at the time the stop-notice is filed[73] and (2) that the prime contractor is indebted to him at the time notice is filed.[74] The stop-notice is purely a creature of statute, and unless the subcontractor complies with the statutory requirements, he is only a general creditor of the contractor.[75]

A source of some confusion concerns the course of action the owner should take upon receiving a stop-notice.[76] Section 85-7-181 provides that if the funds bound in the hands of the owner by a stop-notice are insufficient to satisfy the filing claimants,[77] the funds should be disbursed on a pro rata basis. In *McNair v. M.L. Virden Lumber Co.*,[78] the Mississippi Supreme Court held that one stop-notice protects all other claimants who subsequently file a stop-notice with the owner or who assert their claims in court *before* the owner has disbursed any funds bound in his hands by the first stop-notice.[79] The *McNair* court thus held that all such persons should share ratably in the undisbursed contract funds. The court reasoned that it is the furnishing of the labor or materials which gives rise to the stop-notice right and not the stop-notice filing itself.[80]

The *McNair* decision seems to be a logical application of section 85-7-181. When its reasoning is applied to potential situations, however,

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the contract, King v. Hankins, 209 So. 2d 190, 191 (Miss. 1968), the unpaid subcontractor would then have no rights for any undisbursed contract funds under the *Chancellor* logic. To date, however, this issue remains unresolved.

[73] Smith v. Frank Gardner Hardware & Supply Co., 83 Miss. 654, 36 So. 9 (1904); Rothrock Constr. Co. v. Port Gibson Mfg. Co., 80 Miss. 517, 32 So. 116 (1902).

[74] Sherwin-Williams Co. v. Smith, 253 Miss. 769, 179 So. 2d 263 (1965).

[75] The case of Engle Acoustic & Tile, Inc. v. Grenfell, 223 So. 2d 613 (Miss. 1969), is illustrative of the necessity of complying with the stop-notice provisions. In that case the owners of property executed a contract with a prime contractor for the construction of an office building. No performance bond was required on the contract. Fran, the prime contractor, entered into numerous subcontracts, including one with the plaintiff. Subsequently, Fran did not pay the subcontractor, went into bankruptcy, and the plaintiffs filed stop-notices. The stop-notices, however, were filed after the owner had made the last payment on the contract to Fran. The court held, *inter alia*, that the plaintiffs did not avail themselves of the lien statutes because they did not file their stop-notices until after the owner had paid the contractor the total contract price and therefore the owners were not liable to the plaintiffs for their claims. *Id.* at 619.

[76] See note 55 and accompanying text *supra*.

[77] The term "filing claimants" refers to those persons who file stop-notices under section 85-7-181.

[78] 193 Miss. 232, 4 So. 2d 684 (1941).

[79] It must be realized that the *McNair* court clearly points out that its holding does not apply to the situation "where the owner pays the balance to the one giving notice before he receives such notice from others." *Id.* at 244, 4 So. 2d at 686.

[80] *Id.* at 249, 4 So. 2d at 688.

it creates a dilemma for the owner receiving the stop-notice, especially in large construction contracts. For example, assume that the owner-developer of a multi-million dollar shopping center receives a stop-notice from a subcontractor for $20,000 worth of wiring when the prime contract is 90 days from completion with one progress payment and undisbursed funds remaining in the amount of $50,000 which are payable in 90 days. Under the reasoning of *McNair*,[81] and section 85-7-181, if the owner pays the subcontractor directly out of the remaining $50,000, he could be personally liable if subsequent stop-notice claims are asserted in excess of $30,000 before the final contract payment is made.[82] If the owner does not pay the filing subcontractor, he risks construction delay since the filing subcontractor must sue the prime contractor directly under section 85-7-181 to compel the release of the undisbursed contract proceeds. Construction delay is virtually assured in this instance if the prime contractor denies his obligation to the subcontractor because the prime contractor may be unwilling to complete the contract unless he is assured of receiving the final contract progress-payment intact. Under the presently existing lien provisions,[83] there does not appear to be a satisfactory solution to the owner's dilemma.

A confusing, but perhaps academic,[84] problem with the stop-notice provisions is how they are affected when the contractor is bonded. While dealing with this general area, the case of *Dickson v. United States Fidelity & Guaranty Co.*,[85] does little to resolve the matter satisfactorily. In *Dickson*, Garber contracted with Clancy for the construction of a building. Dickson, at the request of United States Fidelity & Guaranty Company (hereinafter USF & G), executed as surety, with Garber as principal, a bond obligating Dickson to pay all unpaid persons furnishing labor or material under the contract. USF & G agreed to indemnify Dickson for any obligations he incurred under the bond. Garber subsequently defaulted on the contract; Dickson remunerated several unpaid subcontractors and brought suit against USF & G for indemnification. As a defense to the action USF & G asserted that Garber had used funds from the Clancy contract to pay off subcontractors on another contract. Thus the expenses incurred by Dickson were ill-encountered because

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[81] To date no case in this regard has been decided; nevertheless, the reasoning of the *McNair* court would apparently lead to this result in such a situation.

[82] See note 54 and accompanying text *supra*.

[83] For a possible alternative, however, see note 55 *supra*.

[84] Since the bond protects subcontractors under section 85-7-185, the additional protection afforded by stop-notice in most situations is probably purely academic. See section C. 1. *infra* for a discussion of section 85-7-185.

[85] 150 Miss. 864, 117 So. 245 (1928).

Garber should have first paid the Clancy subcontractors and materialmen.[86] The court held, however, that in a private contract the subcontractors and materialmen usually have an equity in the funds due the contractor by the owner of the building under the contract; but where a bond is given, such funds are released from any trust in favor of the subcontractors. The court stated that the purpose of the bonding provision of section 85-7-185 was to provide protection for materialmen and laborers since the execution of the bond was in lieu of their stop-notice rights.[87] Based on the *Dickson* decision,[88] an argument can be made that when a bond is provided in a construction contract, the stop-notice rights of a subcontractor on the project are cut off.

4. Limitations on Effectiveness of Stop-Notice

A major area of concern under the stop-notice provisions is the degree of protection furnished remote subcontractors and materialmen. In large construction contracts, the materialman of a subcontractor could incur a sizable debt while furnishing goods or services. Nevertheless, the subcontractor or materialman of a subcontractor has no stop-notice rights as to the owner's undisbursed contract funds.[89] In addition, it has been held that the subcontractor of a subcontractor has no stop-notice rights on the funds the prime contractor owes the subcontractor.[90] This confusing terminology can be better understood by the following example: If an owner contracts with a prime contractor to build a large building and the prime contractor sublets the painting to *A* who in turn buys his paint from *B*, *B* has no stop-notice protection. Although there are policy considerations in limiting the scope of the stop-notice protection, modern construction practicalities dictate that the "sub of a sub" should be afforded some safeguards.[91] At present, however, no such protection exists.

Another limitation on the stop-notice protection involves advance payments on the contract by the owner to his prime contractor. Since the stop-notice freezes only the undisbursed contract funds in the hands

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[86] *Id.* at 874-76, 117 So. at 246-47.

[87] *Id.* at 878-79, 117 So. at 248.

[88] Though *Dickson* was decided in 1928, its holding is evidently still thought accurate as evinced by the court's citation of *Dickson* with approval in Monroe Banking & Trust Co. v. Allen, 286 F. Supp. 201, 208 (N.D. Miss. 1968).

[89] Monroe Banking & Trust Co. v. Allen, 286 F. Supp. 201, 207 (N.D. Miss. 1968); Gammill Co. v. Guesnard, 167 Miss. 868, 874, 150 So. 214, 215 (1933).

[90] Redd & Hill Sand & Gravel Co. v. L & A Contracting Co., 246 Miss. 548, 553-54, 151 So. 2d 205, 207 (1963).

[91] Brown I, *supra* note 4, at 221.

of the owner at the time of the notice,[92] the subcontractor must file his notice with the owner before he disburses all the contract funds. This would seem to be equitable in most situations, especially where the prime contract contains a schedule for payments by the owner to the prime contractor. Advance payments made by the owner to the prime contractor which terminate the owner's obligation to pay and which are made prior to the stop-notice, have been held to cut off the stop-notice rights of the filing claimant.[93] This is also true even though the contract between the owner and the prime contractor does not authorize advance payments.[94] A mere promissory note by the owner to the prime contractor is not equivalent to an advance payment and therefore does not extinguish the debt,[95] but the owner's assumption of the construction loan obligation of the contractor may extinguish the debt and cut off the stop-notice rights.[96] This limitation would seem to be another reason for the subcontractor to file an early stop-notice.

Several practical considerations limit the effectiveness of a stop-notice. In many small construction contracts, only one or two payments are made by the owner to the prime contractor. Since a subcontractor frequently will not be paid until the prime contractor is paid, it is often too late to file a stop-notice in such a contract; therefore, it is apparent that the subcontractor can lose his right to file a stop-notice before he even learns of the need to file. Furthermore, the mere fact that a subcontractor assumed he would be paid after the owner paid the prime contractor does not aid the subcontractor's unprotected situation.[97] The disruptive effect of a stop-notice also limits its effectiveness. Since the notice frequently results in a halt in construction,[98] many subcontractors are reluctant to use it, fearing business retaliation from their own or other prime contractors.[99] In times of little construction, this limitation is even more stringent. In fact, it is not uncommon for the promise of not asserting a stop-notice to be an express or implied prerequisite to acquiring the subcontract.[100]

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[92] *See* Engle Acoustic & Tile, Inc. v. Grenfell, 223 So. 2d 613, 619 (Miss. 1969).

[93] *Id.*

[94] Williams v. Taylor, 216 Miss. 563, 569, 62 So. 2d 883, 885 (1953).

[95] Fortenberry v. Wilson, 248 Miss. 153, 158, 158 So. 2d 704, 706 (1963).

[96] *See* Chancellor v. Melvin, 211 Miss. 590, 52 So. 2d 360 (1951). *See also* Deposit Guar. Bank & Trust Co. v. J. F. Weaver Lumber Co., 215 Miss. 183, 192-93, 60 So. 2d 598, 601 (1952).

[97] Nicholas v. Deposit Guar. Bank & Trust Co., 248 Miss. 580, 587, 159 So. 2d 187, 190 (1964).

[98] See text accompanying notes 82 and 83 *supra*.

[99] Brown II, *supra* note 22, at 387 n.16.

[100] Brown I, *supra* note 4, at 225.

C. *Bond Provisions*

1. The Effect of Bonding

The law governing bonds in private construction contracts is relatively simple when compared to the provisions on general construction liens and stop-notices. The central bond provision on private construction contracts is section 85-7-185. This section provides in part:

> When any contractor or subcontractor entering into a formal contract with any person, firm or corporation, for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations that such contractor or subcontractor, shall promptly make payments to all persons furnishing labor or material under said contract . . . .

Based on this conditional language, it is readily apparent and important to recognize that the code does not require a private construction contract to be bonded. Section 85-7-185 further provides:

> [I]n the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond . . . .

If a bond is used, it protects subcontractors and materialmen on the construction project even when the bond does not clearly provide for the protection.[101] Therefore a bond, if used, protects the owners by guaranteeing faithful performance of the contract and protects the subcontractors and materialmen on the contract by guaranteeing them payment. This protection, however, does not inure to the benefit of remote subcontractors or materialmen in private construction contracts unless the bond expressly so provides.[102]

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[101] It has even been held that a stipulation in a bond that it does not cover subcontractors or materialmen is not effective. Hartford Accident & Indem. Co. v. Natchez Inv. Co., 161 Miss. 198, 219, 132 So. 535, 538 (1931).

[102] Redd & Hill Sand & Gravel Co., v. L & A Contracting Co., 246 Miss. 548, 151 So. 2d 205 (1963); United States Fidelity & Guar. Co. v. Maryland Cas. Co., 191 Miss. 103, 118, 199 So. 278, 282 (1940); Alabama Marble Co. v. United States Fidelity & Guar. Co., 146 Miss. 414, 420, 111 So. 573, 574 (1927).

2. Enforcing the Bond

The code provides two methods of enforcing the bond provisions. The owner of the project under construction may bring suit upon the bond.[103] Under this approach, the interests of subcontractors and materialmen are protected since they are expressly granted the right to intervene by section 85-7-185. Due to section 85-7-191's explicit provisions stipulating that only one action on a bond is permitted, the importance of this right of intervention cannot be overemphasized.[104]

Section 85-7-187 furnishes the second approach for enforcing a private construction bond. Under that statute a subcontractor or materialman may bring suit directly against the surety and the contractor. This action is available to the subcontractor or materialman only if (1) they have not been paid and (2) the owner has not brought suit on the bond within 6 months from the completion and final settlement of the contract.[105]

Interestingly enough, section 85-7-189 also gives this right to subcontractors in the case of contract abandonment, but fails to include the 6-month limitation imposed by section 85-7-187. The underlying purpose of this waiting period apparently is to allow the owner sufficient time to negotiate with the prime contractor for contract completion before suit is brought on the bond. It would seem that such a limitation would be more appropriate for contract abandonment than contract completion; therefore, the 6-month limitation could be equally applicable to instances of contract abandonment.

3. Limitations on Bonding

Both in theory and in practice, the use of bonding in private construction contracts is highly advantageous. The bond affords maximum protection to the owner for contract completion and aids in ensuring that the contractor will pay his subcontractors and materialmen. In addition, it causes little difficulty to the conscientious prime contractor who pays his debts and completes his contracts since the additional costs involved are passed on to the owner. Several limitations involving the use of bonds do, however, exist.

The first limitation is that when a bond is used, all stop-notice rights to the subcontractor *may* be terminated.[106] When the bond is

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[103] *See* MISS. CODE ANN. § 85-7-187 (1972). Since this section expressly grants certain parties the right to sue upon the "obligee's" (owner's) failure to instutite an action, it can be readily inferred that the owner has the right to initially bring suit.

[104] *Id.* § 85-7-191 also recognizes the right of intervention.

[105] *Id* § 85-7-187.

[106] *See* Dickson v. United States Fidelity & Guar. Co., 150 Miss. 864, 117 So. 245

sufficient to cover both completion of the contract and the money owed the subcontractors and materialmen, loss of the stop-notice rights is negligible. If the bond is insufficient to cover the entire costs, however, the loss could become critical since the owner of the project under construction, as bond obligee, has first priority to the bond proceeds.[107]

A second restriction on the effectiveness of bonding involves its short time limitations. Section 85-7-189 provides:

> When suit is instituted by any such person on a bond, it shall not be commenced until after the complete performance of said contract, and final settlement thereof and shall be commenced within one year after the performance and final settlement of said contract and not later; provided that if the contractor quits or abandons the contract before its completion suit may be instituted by any such person including the owner on said bond and shall be commenced within one year after such abandonment and not later. But said period for the limitation of the institution of said action shall not begin to run until the obligee shall have made said final settlement or determined said abandonment and published notice thereof in some newspaper in said county, or if there be none then in some newspaper having a general circulation therein.

Despite section 85-7-189's explicit statements providing for a 1-year statute of limitations, one cannot readily assume that a subcontractor has a 1-year time period within which he is entitled to bring suit. Therefore, any suit on the bond must be instituted within 1 year from the date of publication of contract completion or abandonment. This 1-year limitation would seem to cover all suits on the bond.[108] The argument could be made that section 85-7-187, which gives subcontractors and materialmen a right to bring suit on the bond if the owner has not done so within 6 months, when read with section 85-7-189, means that the subcontractor has only 6 months within which to institute his suit, a time period which does not start until 6 months after publication of contract completion. This interpretation, however, is probably correct only if the notice of completion of the contract coincides with actual completion or if the term "notice of completion" in section 85-7-189 is synonymous with the term "completion" in section 85-7-187. It clearly appears that the subcontractor must give the owner 6 months from completion to bring suit and that the subcontractor must receive notice before the 1-year limitation begins to run; therefore, the actual time period the sub-

(1928). See text accompanying notes 84 through 87 *supra* for a discussion of this case.

[107] MISS. CODE ANN. § 85-7-193 (1972).

[108] *Id.* § 85-7-191 also limits the time for intervention in such suits to 1 year from the date of publication of contract completion or abandonment.

contractor has to bring suit is directly dependent upon when he is deemed to have received such notice.

The requirement of publication by the obligee-owner of contract completion under section 85-7-189 gives some protection to the subcontractor and materialman.[109] Nevertheless, this confusing, brief time period for the subcontractor to bring suit could seriously injure the innocent but tardy subcontractor. A better reasoned approach would allow anyone protected by the bond to bring suit within 1 year of publication of contract completion with strict notice requirements and liberal intervention procedures.

Certain business practices also limit the effectiveness of the bonding provisions. Both the cost and the limited availability of bonding seriously hamper widespread use of this form of protection. In addition, there is the difficult business decision of how large the bond should be once the parties have decided to use the bonding procedure. In reality, the statutory scheme specifies only who is protected by the bond if used, their order of priority, and how they may enforce their rights upon the bond. Yet, while bonding does not solve all the problems of private construction contracting, the state of the law governing unbonded private construction contracts is so muddled that the cautious attorney who desires to afford his client maximum protection[110] should select use of the bonding procedure whenever possible.

II. The Status of the Subcontractor in Other Jurisdictions

As seen in the discussion of the basic Mississippi statutory scheme, the Mississippi lien laws are a confusing patchwork of legislative ideas whose application sometimes results in gross inequities. In order to eliminate these inequities and confusion, a complete revision of the lien laws is mandatory.

In embarking upon the formidable task of formulating a new statutory scheme for Mississippi, the interests of all the involved parties must be fully considered. In addition to the owner, prime contractor, and subcontractor, such parties include lenders, title insurers, and third party purchasers. To some extent the existing law in Mississippi recog-

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[109] This requirement for publication cannot be waived by custom or practice in the area. Transamerica Ins. Co. v. Paine Supply Co., 194 So. 2d 490, 491 (Miss. 1967).

[110] Although the case of State *ex rel.* Nat'l Sur. Corp. v. Malvaney, 221 Miss. 190, 72 So. 2d 424 (1954), involved a bonded *public* construction contract, its reasoning should be noted as giving warning to the cautious attorney that perhaps contract proceeds in even a bonded *private* construction contract should not be disbursed without ensuring that the subcontractors and materialmen are being paid. In *Malvaney*, no such precaution was taken and the negligent parties were held liable to the surety for its loss under the bond.

nizes these various interests. Therefore, many of Mississippi's problems in this area deal not with major policy decisions but legal uncertainties which can be easily clarified by careful legislative drafting.

For example, the policy behind the present general construction lien provides adequate protection for the prime contractor. If the contractor is unpaid, his debt may be satisified by enforcing the lien which attaches to the improved property. The major existing problem for the prime contractor is how to effectuate this lien. Must he file timely notice of lis pendens, or the contract itself, or the construction lien, or even all three to be protected? Present law does not satisfactorily answer this dilemma. Nevertheless, the problem could be easily resolved by providing one unambiguous method of effectuating the general construction lien. Since more meticulous statutory draftsmanship could easily eliminate this type of problem, the remainder of this comment will not be directed to areas of legislative ambiguity.

In one area, however, there must be a major policy decision. How should the interests of subcontractors and materialmen who are working on the contract, but who are not in privity of contract with the owner, be protected? At present it is not clear whether such parties have a direct lien against the owner's property or whether they are limited to their stop-notice rights against the prime contractor's undisbursed contract proceeds.

This problem has also been difficult for many other jurisdictions. At least four alternative methods of protecting the subcontractor have been advanced: (1) direct lien rights; (2) stop-notice rights; (3) the retainage fund concept; and (4) mandatory bonding. A look at each method is helpful in determining the best way of handling this problem in Mississippi.

A. Direct Lien Rights

Several states have adopted statutory schemes granting an unpaid subcontractor a direct lien on the project to which he has contributed labor, material, or services.[111] This statutory approach is commonly referred to as the "Pennsylvania type."[112] This method

> gives the subcontractor or materialman a direct right of his own regardless of the existence of any indebtedness between the owner and general

[111] *E.g.*, ARK. STAT. ANN. § 51-601 (Repl. Vol. 1971); N.M. STAT. ANN. §§ 61-2-2, -6 (1953); OKLA. STAT. tit. 42, § 143 (1951).

[112] 4 AMERICAN LAW OF PROPERTY § 16.106F (A.J. Casner ed. 1952). *See also* Brown I, *supra* note 4, at 204; Comment, *Mechanics' Liens and Surety Bonds in the Building Trades*, 68 YALE L.J. 138, 144 (1958).

> contractor and the extent of damages are measured by the value of his contribution.[113]

The failure of the general contractor to pay the subcontractors and materialmen will subject the improved property "to their direct lien rights, and to an ultimate foreclosure sale."[114]

A typical Pennsylvania-type statute is section 51-601[115] of the Arkansas Statutes which gives the unpaid mechanic or materialman a direct lien on the improvement. This section specifically provides that

> [e]very mechanic, builder . . . or other person who shall do or perform any work to or upon, or furnish any material . . . for any building, erection, improvement to or upon land . . . shall have for his work or labor done, or materials, fixtures, engine, boiler or machinery furnished a lien upon such building, erection or improvement . . . .

As a means of compelling the original contractor to discharge the liens created by this section, section 51-601 also contains penal provisions. If a contractor or his assignee receives portions of the contract price but has not properly discharged any existing liens, this section instructs that such conduct may be punishable by fine or imprisonment or both.

Although this type of statute affords subcontractors and materialmen adequate protection, the direct lien approach has been severely criticized because of the burden it places on the owner. That the direct lien statutes may force the owner into the undesirable position of having either to pay twice or lose his property after having paid the prime contractor for the work performed seems patently unfair. Furthermore, it should be recognized that the ordinary owner seldom fully understands his legal obligations and that the owner faces an almost impossible task in attempting to police secondary payments.[116]

B. Stop-Notice Rights

While several states have statutes of the Pennsylvania type, others have followed the "New York Rule" which gives the subcontractor stop-notice rights. Simply stated, this rule

> measures the liability of the owner's property by the price stated in the original contract with the general contractor less payments properly made to the contractor. The theory of these statutes is that all lien

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[113] 4 AMERICAN LAW OF PROPERTY, *supra* note 112, § 16.106F. *See also* Brown I, *supra* note 4, at 204; Comment, *supra* note 112, at 144.

[114] Brown I, *supra* note 4, at 204.

[115] ARK. STAT. ANN. § 51-601 (Repl. Vol. 1971).

[116] Brown I, *supra* note 4, at 204-05.

> rights are based directly or derivatively upon the contract between the owner and general contractor.[117]

Under this method of protecting the subcontractor's rights, the owner's liability is limited to the amount due the general contractor.[118] The stop-notice is thus considered to be "a lien on the construction fund as opposed to a lien on the land and the improvement built on it."[119]

Since Mississippi is a stop-notice state and the mechanics of its stop-notice statutory scheme, a typical system, have already been discussed,[120] a detailed examination of the basic stop-notice procedure is unwarranted. However, it is important to examine the reasons stop-notice statutory schemes have enjoyed great popularity. First, the subcontractor's rights are not cut off by a lender's foreclosure of a prior deed of trust on the improved property. Furthermore, even though assignments are frequently used to enable the contractor to obtain a construction loan, the subcontractor's rights are not extinguished by an assignment of the contract proceeds by the prime contractor. A third reason for widespread approval of a stop-notice statutory scheme is that, regardless of the order the subcontractors follow in filing their stop-notices, all filing subcontractors share pro ratably in the contract proceeds if such proceeds are insufficient to satisfy all claims.[121]

Nevertheless, one cannot overlook certain shortcomings inherent in any stop-notice system. Frequently the stop-notice claimant will not learn of the need to file a stop-notice until after the owner has disbursed all the contract proceeds to the prime contractor. In addition, the subcontractor will be under business pressure not to file a stop-notice. Perhaps the biggest problem with a stop-notice, however, is that it often leads to immediate construction delay because of litigation.[122]

C. *Retainage Funds*

Florida and Texas have enacted statutory schemes which provide for the owner's retention of a percentage of the contract price for a period of time after construction has been completed.[123] Since this method is

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[117] 4 AMERICAN LAW OF PROPERTY, *supra* note 112, § 16.106F, at 230.

[118] Comment, *supra* note 112, at 159.

[119] Comment, *California's Private Stop-Notice Law: Due Process Requirements*, 25 HASTINGS L.J. 1043, 1048 (1974).

[120] See text accompanying notes 51 through 100 *supra*.

[121] Comment, *supra* note 119, at 1049-50. Even though these comments focus on the California stop-notice statutory scheme, they appear to be equally applicable to Mississippi and other jurisdictions since California is a typical stop-notice state.

[122] See notes 89 through 100 and accompanying text *supra*.

[123] FLA. STAT. ANN. § 713.06 (1969); TEX. REV. CIV. STAT. ANN. arts. 5452-71 (Cum. Supp. 1975).

basically a variant of the stop-notice concept, these statutory approaches protect the rights of subcontractors and materialmen and also limit the liability of the owner.

Because this fund containing a percentage of the contract price arises by operation of law and does not depend solely upon receipt of a subcontractor's notice, the Texas statutes refer to it as "statutory retainage."[124] Under Texas law the owner is required to withhold 10 percent of the contract price for 30 days after completion of the contract.[125] By imposing this withholding restriction, the Texas Legislature has clearly indicated that it is seeking

> to secure the payment of artisans and mechanics who perform labor or services and to secure the payment of any other claimants furnishing material, or material and labor, or specially fabricated material for any contractor, subcontractor, agent or receiver . . . .[126]

This statutory scheme also provides that all persons who file their notices and affidavits within 30 days of completion of the work may obtain a lien on the retainage fund.[127] Furthermore, if the owner fails to withhold the retainage fund, the claimants are entitled to a lien on the property to the extent of the amount of funds they would have received had the 10 percent been withheld.[128]

The Texas system, in addition to the "statutory retainage" fund, also employs a "fund-trapping" statute which authorizes the owner to withhold funds due the original contractor after receipt of a valid subcontractor notice.[129] These "trapped" funds are to be retained by the owner until time has passed for the subcontractor to secure a lien, unless payment is made or the claim is otherwise settled.[130] When a subcontractor files a "fund-trapping" affidavit, the original contractor must defend the action at his own expense.[131] In case of a judgment against the owner or his property, the owner may deduct the amount of the judgment plus costs from the amount due the contractor.[132]

The Texas procedure has been criticized, however, as too complex.[133] It has been suggested that the average subcontractor can as

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[124] Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 Sw. L.J. 665, 682 & n.152 (1972).

[125] TEX. REV. CIV. STAT. ANN. art. 5469 (Cum. Supp. 1975).

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* art. 5463.

[130] *Id.* (1)(c).

[131] *Id.* (2).

[132] *Id.*

[133] Youngblood, *supra* note 124, at 677.

readily understand the Internal Revenue Code as ascertain his duties under the Texas mechanics' and materialmen's liens statutes.[134]

Florida's statutory scheme requires the owner to retain the last payment due under the contract or 10 percent of the original contract price, whichever is greater, until the contractor has delivered to the owners[135]

> an affidavit stating, if that be the fact, that all lienors have been paid in full or, if the fact be otherwise, showing the name of each lienor who has not been paid in full and the amount due or to become due each for labor, services, or materials furnished.[136]

The Florida statute provides that when the owner receives the affidavit reciting outstanding bills for labor, services, or materials, he should pay these bills directly after giving the contractor notice and deduct these payments from the amount due the contractor.[137] If the final payment is insufficient to pay all outstanding bills, then the owner is to pay no one until the contractor has furnished him the difference.[138] If the difference is not furnished to the owner, he should disburse to each lienor "the amounts due from him on a direct contract."[139] Failure of the owner to withhold the last payment will subject his property to the "full amount of valid liens of which the owner has notice at the time the contractor furnishes his affidavit."[140] Under the Florida statutory scheme, however, the owner will be exempted from the above requirements if he obtains a payment bond in at least the amount of the original contract price before commencing construction.[141]

D. Mandatory Bonding

Mandatory bonding is probably the simplest plan used to protect the subcontractor since the only requirement is that the prime contractor obtain a payment bond for all work performed whose cost exceeds a certain dollar amount. Furthermore, perhaps better than any other plan, mandatory bonding protects all the parties to the contract.

In 1932 a committee sponsored by the United States Department of Commerce drafted the Uniform Mechanics' Lien Act which was to

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[134] *Id.*
[135] FLA. STAT. ANN. § 713.06(3)(d)(5) (1969).
[136] *Id.* (3)(d)(1).
[137] *Id.* (3)(d)(2).
[138] *Id.* (3)(d)(3).
[139] *Id.*
[140] *Id.* (3)(d)(6).
[141] *Id.* § 713.23.

extend bonding requirements to private construction.[142] By requiring the general contractor to obtain adequate bonding, the owner would be able to exempt his property from liens under the act.[143] Although a few states have adopted similar legislation allowing owners voluntarily to substitute bond protection for mechanics' lien liability,[144] the act itself has largely been ignored.[145]

The permissive nature of statutes patterned after section 7 of the Uniform Mechanics' Lien Act "probably afford[s] little protection to the subcontractor or supplier."[146]

> When initiated industry-wide, bonding serves to apply the corporate sureties' investigation experience in such a way as to eliminate the bad credit risk. But if the system is merely permissive, the contractor who is unable to secure a bond will continue to operate under the lien law. Owners may, of course, refuse to accept him without adequate bonding, but other economic considerations such as a significantly low bid, could induce an owner to forego the protection of a bond.[147]

The problem presented under such a permissive bonding statute is obvious. The qualified contractor from whom the subcontractors and suppliers need no protection would be able to obtain adequate bonding. The unqualified contractor, however, would generally be unable to obtain adequate bonding and protection would thus be denied in the area where it is most needed.[148]

At first blush, the mandatory bonding of private construction projects over a certain dollar amount appears to be the perfect solution to the mechanics' lien problem, but it also presents several problems of its own. One often cited problem is that the owner's cost would be greatly increased because the cost of the premium on the bond would be passed from the general contractors to the owner.[149] When the premium cost is compared to the costs of stop-notice and lien litigation, however, the increase would not seem to be unreasonable.[150]

The effect of mandatory bonding on contractors must also be considered. Although it has been argued that such a statute would force

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[142] UNIFORM MECHANICS' LIEN ACT § 7 (1932).

[143] *Id.*

[144] *E.g.*, FLA. STAT. ANN. § 713.23 (1969).

[145] Imlay, *Problems in Uniform Mechanics' Lien Act*, 19 A.B.A.J. 116 (1933); Note, *Legislation: The Proposed Uniform Mechanics' Lien Act*, 19 VA. L. REV. 409 (1933).

[146] Comment, *supra* note 112, at 166.

[147] *Id.*

[148] *Id.* at 167.

[149] Hunt, *California Mechanics' Lien Law: Need for Improvement*, 9 SANTA CLARA LAW. 101, 107 (1968).

[150] *Id.* at 109.

many contractors out of business because they are unable to secure adequate bonding, eliminating poor risks in the construction industry might well serve to stabilize the industry.[151] Furthermore, relatively new contractors who are without the substantial assets and favorable reputations needed to obtain the required bonding could build their assets and reputations by either embarking on the smaller jobs for which no bonding is required or by acting as a subcontractor. Although the number of bondable contractors may be considerably lower than the number of contractors industry-wide, mandatory bonding in public works has not prevented public agencies from finding an ample supply of contractors able to satisfy the statutory bonding standards. Probably the most important attribute of mandatory bonding is that it would completely protect all the parties involved.[152]

The State of Utah has enacted legislation which *requires* the owner to either obtain a bond from the contractor or be personally liable to the subcontractors.[153] Section 14-2-1 of the Utah Code requires the owner, before the commencement of any construction involving $500 or more, to

> obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties, conditioned for the faithful performance of the contract and prompt payment for material furnished and labor performed under the contract.[154]

Any unpaid subcontractor is given "a direct right of action against the sureties" on the bond "for the reasonable value of the materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon . . . ."[155]

Section 14-2-2 of the Utah Code provides that if an owner fails to obtain a bond as provided for in section 14-2-1, he can be held personally liable to those furnishing materials or performing labor under the contract.[156]

Despite these two sections of the Utah Code, bonds are often not used in Utah either because the landowner is unaware of the Utah bonding provisions or because he has confidence in the contractor and desires to avoid the cost of a bond.[157] To avoid this problem, it has been

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[151] *Id.* at 108; *see* Note, *The Utah Law of Mechanics' Lien*, 10 UTAH L. REV. 181, 194 (1966).

[152] Hunt, *supra* note 149, at 108-09.

[153] UTAH CODE ANN. §§ 14-2-1, -2 (Repl. Vol. 1973).

[154] *Id.* § 14-2-1.

[155] *Id.*

[156] *Id.* § 14-2-2.

[157] Note, *supra* note 151, at 193.

suggested that the statute be amended "to require the principal contractor to procure a bond before a building permit is granted."[158]

E. An Overview

A major policy decision must be made in regard to the subcontractor's status in Mississippi. An optimum solution could be reached through a combination of the retainage fund and stop-notice concepts. The previously discussed Texas and Florida laws provide an excellent basis for a new statutory scheme offering both protection and simplicity.[159] The 10 percent retainage fund as used in Texas, however, has been criticized as being too small a sum to provide adequate protection for subcontractors.[160] Initially providing for a substantially higher percentage of retainage, however, might prove to be too heavy a burden on the prime contractor. We suggest that through a combination of the princi-

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[158] *Id.*

As previously discussed, the present Mississippi statutory scheme contains permissive bonding statutes for private construction projects. The Mississippi Legislature, however, has also enacted mandatory bonding provisions for public works, which should be briefly discussed before the recommendations for change are considered.

Section 31-5-1 requires that any contractor entering into a contract with the state or any of its political subdivisions must execute a bond obligating him to pay all persons supplying labor or materials for the contract. This section further provides that any unpaid subcontractor or materialman has the right to intervene in any action instituted on such bond with the subcontractor's or materialman's rights subject only to those of the obligee. The section also states that if the bond is insufficient to pay all claimants, each claimant is entitled to a pro rata share upon payment to the obligee. Section 31-5-5 provides that if the obligee does not bring an action on the bond within 6 months from completion and final settlement of the contract, then any unpaid subcontractor or materialman may bring a suit on the bond in his own right. Section 31-5-7 limits this right by providing that no suit may be brought on the bond or the construction contract until the obligee publishes notice of final settlement or abandonment of the contract. This section also provides that no suit may be brought more than 1 year from the time the obligee publishes this notice. Section 31-5-9 authorizes the surety on the bond to require that all known claimants under the bond be joined as parties. The Mississippi courts will imply in the bond "all the terms required by [section 31-5-9] even if the omission of the terms were intentional." Union Indem. Co. v. Acme Blow Pipe & Sheet Metal Works, 150 Miss. 332, 352, 117 So. 251, 254 (1928); Commercial Bank v. Evans, 145 Miss. 643, 652, 112 So. 482, 483 (1927).

Although the groundwork for a mandatory bonding statute for private construction has been laid in Mississippi with the permissive bonding statutes for private works and the mandatory bonding statutes for public works, the ramifications of such a statute must be carefully weighed against those of other statutory schemes. *See* Hunt, *supra* note 149; Comment, *supra* note 112.

[159] "The concept of trapping funds with notice, coupled with a mandatory percentage retainage requirement, is as workable as any and better than most." Youngblood, *supra* note 124, at 706.

[160] *Id.* at 707.

ples of the stop-notice and the retainage fund, an adequate solution may be reached. By initially providing for a 10 percent retainage fund and enlarging this fund by the amounts required by the stop-notice received, an adequate fund may be obtained. This statutory scheme would place only minimal additional burdens on the parties. Such burdens would be greatly outweighed by the extra protection afforded all parties involved.

III. Proposals

It is readily apparent that the existing Mississippi lien laws present numerous problems and uncertainties. These problems and uncertainties have become so extensive as to mandate substantial changes in the Mississippi statutory scheme. The system we now propose for Mississippi could conceivably prove to be one of the simplest statutory schemes. In drafting our proposals, we relied heavily upon the laws of Texas and Florida as well as retaining several characteristics of the present Mississippi law. The following paragraphs outline the basic proposals.

> 1. Only persons in privity of contract with the owner shall have a right to the general construction lien. The lien should take effect only upon compliance with the second proposal. No other filing is necessary to effectuate this lien.

This proposal reaffirms what we believe to be the intent of the Mississippi Legislature as reflected in section 85-7-135 of the 1972 Mississippi Code. With this express language and no other, the possible present statutory inconsistency can be eliminated. Furthermore, by granting a right to the general construction lien to only those in privity with the owner, the subcontractor is limited to his rights in the retainage fund.

> 2. Before commencement of the project, the prime contractor shall file a notice of the contract which should contain the owner's name and address, the construction lender's name and address, a description of the property and the projected completion date. Failure to file such notice constitutes a waiver by the prime contractor of the right to the general construction lien.

The first part of this proposal is actually a modification of section 85-7-139 of the 1972 Mississippi Code. This section would be amended to provide that a notice of the construction contract should be recorded in one central filing place. By allowing notice filing rather than filing the document itself, the contractor will save both time and legal expense. In addition, the confusion presently existing as to what filing is necessary to effectuate the general construction lien would be eliminated.

This notice should be in a simple form such as:

> [*Contractor*], whose address is _____, and [*Owner*], whose address is _____, have entered into a contract for the construction (or repair of) [*a house, apartment building, etc.*] located at [*description*]. Such construction is to commence _____, 19 ___, and the projected completion date is _____, 19___. This construction or repair is financed by [*Construction Lender*], whose address is _____.
>
> [*Contractor*]

This notice would provide the subcontractor with the information needed in order to file a stop-notice correctly. The projected completion date would also give the subcontractor a general guideline for the time in which he may file his notice. Of course, as completion dates in construction contracts often change, the completion date on the contractor's notice need not be altered since the subcontractor will receive under proposals 7 or 8 formal notice from the contractor or owner of completion or abandonment. In order to compel the contractor to file the notice of the contract before commencing work, it may be necessary to require the construction lender, or, if no construction lender is involved, then the owner, to withhold any payments to the contractor before the notice is filed. Any payments made to the contractor before the notice is filed could be considered as being held in a constructive trust for the retainage fund, with the construction lender being liable for the funds upon the final accounting.

These burdens are placed upon the prime contractor and construction lender in order to ensure that the notice is properly filed. This is not too great a burden on either party since both the prime contractor and the construction lender are certainly in a position to see that notice is properly filed. The burden is not first placed upon the owner if a construction lender is used simply because the construction lender is more likely to be aware of the requirements. The prime contractor's and construction lender's fulfillment of these duties guarantees proper filing, which in turn will greatly aid the subcontractor in his attempts to quickly and accurately ascertain the information needed to file a proper stop-notice.

> 3. Any person who is not in privity of contract with the owner, but who anticipates contributing materials and/or labor for the construction project should file written notice (giving his name, mailing address, and the nature of his contribution) with the construction lender on the project, or if none, with the owner. Failure to file the notice extinguishes all rights against the retained contract proceeds.

This proposal is for the benefit of the subcontractor. By this notice the owner of the project is provided the names of all contributing parties not in privity with the owner so that he can notify them in the event the prime contractor abandons the contract. The procedure for giving this notice is discussed in proposal 8.

> 4. The construction lender shall withhold 10 percent of the contract price until 30 days after notice of completion or abandonment has been filed.

This proposal is a variation of Article 5469 of the 1975 Texas Statutes and would impose a withholding requirement on the construction lender, or owner if no construction lender is used. The lender, or owner if no lender, must retain a fund equal to 10 percent of the contract price during the progress of the work and for 30 days after the notice of completion or abandonment is filed. We believe that this duty should fall on the construction lender, if used, rather than the owner, simply because expertise in this field may be more readily acquired by lending institutions. By placing this burden on the construction lender, the problem of the owner having to pay twice for the same work or the subcontractor obtaining less than satisfactory reimbursement for his services may be minimized. Failure of the construction lender, or owner if there is no lender, to retain 10 percent of the funds would make him liable for the amount that should have been retained.

> 5. Anyone in privity with the prime contractor may file with the lender or owner a statement specifying the type of work done and the fact that he has not been paid. This statement may be filed at any time between the date the subcontractor's bill becomes due and 30 days after the completion or abandonment notice is filed by the contractor.

This proposal provides for the stop-notice or "fund-trapping" as it is described by the Texas Code. It should provide a simple procedure whereby anyone in privity with the contractor can give the owner and construction lender adequate notice that he has not been paid in order that funds may be withheld from the contractor and added to the retainage fund. A simple form would suffice in this situation:

> [*Subcontractor*], whose address is _____, entered into an agreement with [*Contractor*] whereby [*Subcontractor*] furnished [*brief description of labor, materials, etc.*] for the project owned by [*Owner*]. Such project is located at _____.
>
> Having not been reimbursed pursuant to said agreement, it is demanded that $____ be withheld from the contractor and placed into the statutory retainage fund.
>
> Copies of this notice have been delivered to [*Contractor*], [*Owner*], and [*Construction Lender*].
>
> [*Subcontractor*]

This document should be notarized and the original filed with the chancery clerk. Copies should be delivered to the contractor, owner, and the construction lender.

> 6. Upon receipt of the statement as provided for in the preceding proposal, the construction lender shall withhold the amount due the subcontractor from the contractor and deposit this amount in the retainage fund if such funds are still available as provided for in proposal 4.

Failure on the part of the construction lender, or owner if no construction lender, to comply with the stop-notice should render that party directly liable for the amount that should have been retained in this manner.

A penalty should be provided for anyone who knowingly files a false stop-notice. A suitable penalty might be the disallowance of the guilty party's sharing in any part of the retainage fund.

> 7. Upon completion of the project the prime contractor must file with the owner an affidavit that all persons in privity with him have been notified of the completion of the project by registered mail. Failure to comply with this provision shall extinguish any right the prime contractor has in the retained contract proceeds.

This proposal requires the contractor to notify the subcontractors of his completion of the contract and to file notice with the owner that he has so notified the subcontractors. This will inform the unpaid subcontractor of the need to file promptly a claim against the retained contract proceeds in accordance with proposal 9.

> 8. Upon contract abandonment the construction lender or if none, the owner, must give notice of such abandonment by registered mail to all persons having complied with proposal 3.

This procedure parallels proposal 7 and also facilitates the unpaid subcontractor's right to file a claim against the retained contract proceeds promptly.

> 9. Any person who contributed materials and/or labor for the construction project but who was not in privity of contract with the owner and at the time of contract completion or abandonment remains unpaid, shall have up to 30 days from the date of notice of the announced completion or abandonment to file with the construction lender or if none, with the owner, a claim against the retained contract proceeds. Such claim must be in writing and should include the name and address of the filing party, the nature and time of the work performed or materials supplied, and the amount remaining to be paid. Failure to file such notice within the prescribed time period terminates all rights for such persons.

This proposal sets forth the steps necessary to make a claim against the retained contract proceeds. This claim, however, could also be satisfied through the filing allowed in proposal 5.

> 10. After 30 days from the filing of the notice provided for in proposals 7 or 8, those in privity with the prime contractor who are unpaid and have filed a claim under proposals 5 or 9 are to share pro rata in the retainage fund. Any excess is to go to the contractor.

This proposal provides for pro rata sharing in the retainage fund by those in privity with the contractor. At this point, precautions should be taken to ensure that no subcontractor will present a fraudulent claim against the retainage fund. Therefore, any contractor or subcontractor should be granted the right to challenge the amount of the claim of any subcontractor sharing in the fund. In order not to delay innocent subcontractors from receiving their lawful portions, the fund should be initially divided according to the original claims. When a subcontractor's claim is later challenged, if successful, the recovered portion less the reasonable expenses of the challenging party should be shared ratably among the subcontractors with any excess going to the contractor.

> 11. Any assignment of the contract proceeds by the prime contractor is subordinate to the rights of those persons protected by the retainage procedure.

This proposal is a minor variation of the present procedure outlined in section 85-7-183 of the 1972 Mississippi Code. It safeguards the protected parties against assignment of contract proceeds, a frequent practice of prime contractors used to acquire sufficient construction funds.

> 12. If the contract between the prime contractor and the owner does not provide a schedule for payments, the payments may be made at any time, subject only to the limitation of the retainage fund. If the contract calls for scheduled payments, no advance payments from the owner to the prime contractor may be made without prior notice to all subcontractors or materialmen in compliance with proposal 3.

This proposal is inserted to alleviate the previously discussed advance payment problem. Under this procedure an unpaid subcontractor is able to increase the size of the retainage fund through proposal 5 *before* the owner has disbursed all the unretained contract proceeds to the prime contractor.

> 13. So long as the owner complies with the provisions of this proposal, his liability is limited to the amount of the contract.

This proposal is added to protect the owner. Should an owner fail to comply with the provisions, his liability could exceed the amount of

the contract. For example, if he fails to increase the retainage fund as provided in proposal 6, he is directly liable for any amount the unpaid subcontractor is unable to satisfy out of the 10 percent retainage fund.

> 14. Compliance with the preceding proposals is unnecessary if the owner acquires a bond for the full amount of the contract price.

This proposal provides for the optional bonding of the contract in order to avoid the procedures previously outlined. As discussed, the obtaining of a bond for the full amount of the contract price serves to adequately protect the interests of all parties concerned. Such an alternative will be especially useful in small contracts where the previously discussed protections are outweighed by the time and trouble they will entail.

> 15. Suit on the bond may be brought by any protected party provided such suit is filed within 1 year of contract completion.

This proposal is designed to retain the basic existing bond procedures but seeks to eliminate the 6-month waiting period in favor of a 1-year period for all interested parties. This section further contemplates strict notice requirements and liberal intervention procedures.

Our proposals have not dealt with the interests of remote parties, *i.e.*, those not in privity with either the owner or the contractor. These remote persons, however, could have the remedy of attaching the subcontractor's portion of the retainage fund, if in privity with that particular subcontractor.

As may be readily observed, extra burdens are placed upon the prime contractor and the construction lender. The owner is practically burden-free if he uses a construction lender. This objective was sought in the formulation of these proposals, because more than likely the owner will be completely unaware of the state mechanics' lien laws. Conversely, the prime contractor and the construction lender deal with this type of situation on a day-to-day basis and therefore may more readily acquire expertise in this area.

Conclusion

The present Mississippi law governing private construction contracts offers a three-fold system of protections: (1) general construction liens; (2) stop-notice provisions; and (3) bonding provisions. Existing limitations and uncertainties, however, severely restrict the efficacy of the statutory scheme.

Though the current lien provisions clearly provide for a general construction lien, one cannot be sure exactly what parties have a right to the lien or, assuming a party does have the right, how he should

effectuate it. Since the realities of the keenly competitive construction industry severely restrict the use of the stop-notice and since, if used, the stop-notice can place the owner in an irreconcilable position,[161] Mississippi's stop-notice provisions have not produced optimum results. Mississippi's bonding provisions, although optional, do provide a means for circumvention of the above difficulties; however, clarification of the notice requirements and statutes of limitations is badly needed.

The proposals offered in this comment attempt to resolve these problems through clearer statements as well as through suggestions for new and different procedures. We view the general construction lien provisions as an area in need of more careful legislative drafting, and therefore offer modifications which would clarify existing law. In the area of subcontractor protection, however, we suggest that a major policy decision be made. In advocating a retainage fund and an accompanying "fund-trapping" statute, we have attempted to provide the best possible protection for both the subcontractor and the owner, without any detriment to the interests of the prime contractor.

Our suggestions are in the furtherance of one basic goal: the simplification of the present law governing private construction contracts. If this purpose can be achieved, then the procedure can be a meaningful and useful tool for those who use it. Nevertheless, any change in the law governing construction contracts will face stringent lobbying efforts.[162] These efforts should be encouraged to ensure careful consideration of all the practical aspects of any modifications, but they should not prevent the legislature from completely overhauling Mississippi's law governing private construction contracts. Any efforts short of complete change, such as a selected amendment procedure, will do little to aid our presently existing patchwork of confusion.[163] It would result only in further chaos and confusion. The proposals presented in this comment are not a complete answer to all the problems in this area. They may, however, form the backbone of the major revision needed. In any event, even if they are merely a catalyst for legislative study and reform, these proposals will have served a desperately needed function.

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Boswell Stevens Hazard

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[161] If there is a conflict between the prime contractor and the subcontractor over the money allegedly due the subcontractor, the owner could be sued by the prime contractor if he pays the subcontractor himself. If he does not pay the subcontractor and freezes the contract proceeds in the escrow account, he may risk construction delay as the contractor may be unwilling to complete the contract without further payments. If the owner ignores the stop-notice, he may subsequently be held liable by the subcontractor.

[162] *See* Brown I, *supra* note 4, at 203.

[163] Professor Brown believes our present problems stem chiefly from such patchwork amendment attempts. *See* Brown I, *supra* note 4.

OPPRESSION OF MINORITY SHAREHOLDERS: A PROPOSED MODEL AND SUGGESTED REMEDIES

In 1933 Illinois adopted the first statute allowing a minority shareholder to bring suit for involuntary dissolution of a corporation when the conduct of management or those in control of the corporation is illegal, oppressive, or fraudulent.[1] Today 29 states have enacted identical or similar statutes.[2] While this legislative trend is consistent with the recent recognition and development of a fiduciary duty of majority shareholders to the minority,[3] and while it provides minority shareholders with a remedy against a majority's oppressive acts, courts have been reluctant to relieve the minority shareholder's situation by dissolving the corporation.[4]

Opposing corporate law doctrine and the very nature of the dissolution remedy itself account for this reluctance. Concepts of majority rule and business judgment insulate corporate management in its decision-making process and provide the flexibility necessary to make corporate

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[1] Ill. Laws [1933] § 86, p. 308 (July 13, 1933).

[2] *Illegal, Oppressive, or Fraudulent Conduct*: ALA. CODE tit. 10, § 21 (78)(A)(2) (Cum. Supp. 1973); ALASKA STAT. § 10.05.540(2) (1962); ARK. STAT. ANN. § 64.908(A)(2) (Cum. Supp. 1973); ILL. ANN. STAT. ch. 32, § 157.86(a)(3) (Smith-Hurd Cum. Supp. 1975-1976); IOWA CODE ANN. § 496A.94(1)(C) (Cum. Supp. 1975-1976); MD. CORP. & ASSOC. CODE ANN. § 3-413(b)(2) (1975); MICH. COMP. LAWS ANN. § 450.1825(1) (1973); MISS. CODE ANN. § 79-3-193(a)(2) (1972); MO. ANN. STAT. § 351.485.1(1)(b) (1966); MONT. REV. CODES ANN. § 15-2290(a)(2) (Cum. Supp. 1974); NEB. REV. STAT. § 21-2096(1)(b) (Cum. Supp. 1965); N.J. REV. STAT. ANN. § 14A:12-7(1)(c) (Cum. Supp. 1975-1976); N.M. STAT. ANN. § 51-29-16(1)(b) (Supp. 1973); N.D. CENT. CODE § 10-21-16(1)(b) (1960); ORE. REV. STAT. § 57.595(1)(a)(B) (1973); R.I. GEN. LAWS ANN. § 7-1.1-90(a)(2) (1970); S.D. COMP. LAWS ANN. § 47-7-34(2) (1969); TENN. CODE ANN. § 48-1008(1)(a)(iii) (Cum. Supp. 1975); TEX. BUS. CORP. ACT art. 705(A)(1)(c) (1956); UTAH CODE ANN. § 16-10-92(a)(2) (1973); VT. STAT. ANN. tit. 11, § 2067(a)(1)(B) (1973); VA. CODE ANN. § 13.1-94(a)(2) (Repl. Vol. 1973); WASH. REV. CODE ANN. § 23.28.170(1)(b) (1969); WYO. STAT. ANN. § 17-36.86(a)(2) (1965).

Similar Provisions: CAL. BUS. & PROF. CODE § 4651(e) (1975) ("persistent unfairness"); MINN. STAT. ANN. § 301.49 (1969) ("persistent unfairness"); N.C. GEN. STAT. § 55-125(a)(4) (1975) ("reasonably necessary to protect the interests and rights of minority shareholders"); PA. STAT. ANN. tit. 15, § 2107(A)(2) (Purdon's 1967) ("illegal, oppressive, or fraudulent and it is beneficial to the shareholder that the corporation be wound up and dissolved"); S.C. CODE ANN. § 12-22.15(a)(4) (Supp. 1974) ("oppressive or unfairly prejudicial").

[3] *See, e.g.*, Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969); Donahue v. Rodd Electrotype Co., ___ Mass. ___, 328 N.E.2d 505 (1975); *cf.* Baker v. Commercial Body Builders, Inc., 246 Ore. 614, 507 P.2d 387, 394 (1973). *See also* Comment, *Oppression as a Statutory Ground for Corporate Dissolution*, 1965 DUKE L.J. 128, 132-35; Note, *Freezing Out Minority Shareholders*, 74 HARV. L. REV. 1630, 1636-40 (1961).

[4] See text accompanying notes 94 through 101 *infra*.

policy without fear of incurring liability for erroneous action.[5] Further, the practical consequences of liquidating an ongoing concern upon the shareholders, the corporation, its employees, competitors, and the public prevent a mechanical application of the dissolution remedy.[6] Indeed, evidence of the majority's oppression of minority shareholders must appear to be overwhelming before dissolution will be granted.[7] Though dissolution may not be warranted, the conduct of those in control is no less oppressive to the minority and unless some form of relief is provided, the minority shareholders' position may become insufferable. Recognizing that, within limits, minority shareholders may be subjected to management's oppressive action without necessitating dissolution, state legislatures have created less stringent remedies, and courts have fashioned equitable remedies to allay the minority. After examining cases[8] and commentary[9] dealing with oppression by majority shareholders, this comment will suggest a model for analyzing this type of conduct in order to determine when the remedy of dissolution is appropriate.[10] The courts' authority to provide lesser remedies for oppressive conduct will be considered and the various types of relief granted will be surveyed.[11] Finally, the relatively recent development of less harsh legislative remedies will be treated, and amendments to the present Mississippi Business Corporation Law will be proposed.[12]

I. Oppressive Conduct

A. The Search for Viable Criteria

1. The Courts

In interpreting the phrase "oppressive conduct," the courts have eschewed concrete definitions encompassing particular acts or a series of acts but rather have formulated sweeping abstract generalizations. The Illinois Supreme Court has noted that

> "oppressive" [conduct] does not carry an essential inference of imminent disaster; it can . . . contemplate a continuing course of conduct. . . . [T]he word "oppressive" does not necessarily savor of fraud,

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[5] See text accompanying notes 68 through 72 *infra*.

[6] See text accompanying notes 97 through 99 *infra*.

[7] *See, e.g.*, Polikoff v. Dole & Clark Bldg. Corp., 37 Ill. App. 2d 29, 184 N.E.2d 792 (1962); Hockenberger v. Curry, 191 Neb. 404, 215 N.W.2d 627 (1974).

[8] See text accompanying notes 27 through 54 *infra*.

[9] See text accompanying notes 13 through 26 *infra*.

[10] See text accompanying notes 54 through 74 *infra*.

[11] See text accompanying notes 102 through 113 *infra*.

[12] See text accompanying notes 116 through 121 *infra*.

> and . . . the absence of "mismanagement, or misapplication of assets" does not prevent a finding that the conduct of [those in control] has been oppressive . . . .[13]

Similarly, the Virginia Supreme Court has adopted the definition that

> [o]ppressive means ". . . a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely." . . . It has also been held to mean ". . . a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members."[14]

While these broad statements are probably necessary to provide the courts with the freedom necessary to decide a particular case, the statements are of little aid in determining what conduct or facts contributed toward the finding that involuntary dissolution of the corporation was or was not warranted.

2. Commentary

Commentators have offered various suggestions as to what type of conduct is oppressive. After reviewing examples of the common law involuntary dissolution decisions and those cases decided under statutes providing for involuntary dissolution upon a showing of illegal, oppressive, or fraudulent conduct, one writer has suggested that the word "oppressive" essentially connotes nothing more than conduct which, under the common law decisions, had been labeled as "fraudulent" and which "must inhere in several transactions before dissolution will be

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[13] Central Stand. Life Ins. Co. v. Davis, 10 Ill. 2d 566, 141 N.E.2d 45, 50 (1957). For a discussion of this decision, see Note, *Corporate Dissolutions For Illegal, Oppressive or Fraudulent Acts: The Maryland Solution*, 28 MD. L. REV. 360, 369-70 (1968).

[14] White v. Perkins, 213 Va. 129, 134, 189 S.E.2d 315, 320 (1972), *citing* Elder v. Elder & Watson, Ltd., [1952] Sess. Cas. 49, 50 (Scot. 1st Div. 1951); Scottish Co-op. Wholesale Ltd. v. Meyer, [1959] A.C. 324 (Scot. 1958). Although the definitions for oppressive conduct in the Great Britain decisions have been quoted by different American jurisdictions, Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387, 393 (1973); White v. Perkins, *supra*, these decisions have not attempted to analyze whether the term oppressive conduct under the Great Britain decisions is simply a restatement of a common law duty which majority shareholders owe the minority or whether it creates a higher duty of fair dealing toward the minority. For a discussion of this issue *vis-a-vis* oppressive conduct decisions in Great Britain and Australia, see Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 VA. L. REV. 1043, 1059-63 (1969). American decisions appear to suggest, and most commentators have asserted, that the oppressive conduct standard establishes a new, higher duty of fair dealing toward the minority. *See* Baker v. Commercial Body Builders, Inc., *supra* at 393-95; text accompanying notes 15 through 26 *infra*.

ordered."[15] While the cases and the legal writers are in general agreement with the element of a continuing course of conduct,[16] the contention that oppression is the equivalent of fraudulent conduct by the majority shareholders has been rejected by several jurisdictions and commentators.[17]

Another author has argued that although oppression is more than mere control by the majority over corporate affairs, allegations of oppression by the majority shareholders do not necessitate proof of corporate insolvency or even pecuniary loss.[18] The author further contends that close corporations should be accorded treatment differing from publicly held corporations since the acts of corporate directors and officers, such as withholding payment of dividends, have a greater impact upon minority shareholders of close corporations.[19] The author concludes that the prohibition against oppressive conduct encompasses a greater area of corporate activity than is provided under the shareholder and director deadlock provisions of the typical involuntary dissolution statute.[20] What acts constitute oppressive conduct, however, remain ill-defined.

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[15] Note, *supra* note 13, at 371, 374.

[16] Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131, 138 (1960); Compton v. Paul K. Harding Realty Co., 6 Ill. App. 3d 488, 285 N.E.2d 574, 581 (1972); Baker v. Commercial Body Builders, Inc., 246 Ore. 614, 507 P.2d 387, 397 (1973); *see* White v. Perkins, 213 Va. 129, 134, 189 S.E.2d 315, 319 (1972); *cf.* Kessler v. United Agencies, Inc., 243 S.W.2d 779 (Mo. App. 1951). *See also* Comment, *Relief to Oppressed Minorities in Close Corporations: Partnership Precepts and Related Considerations*, 1974 ARIZ. ST. L.J. 409, 424-25; Comment, *supra* note 3, at 136-37 (suggesting that "numerous acts of misconduct . . . coupled with disproportionate loss to the minority . . . may shift the burden to defendants to establish the fairness of their position").

[17] Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131, 138 (1960); Baker v. Commercial Body Builders, Inc., 246 Ore. 614, 507 P.2d 387, 393 (1973); White v. Perkins, 213 Va. 129, 134, 189 S.E.2d 315, 319 (1972); Comment, *supra* note 3, at 137; 30 U. CIN. L. REV. 478, 484 (1961).

[18] Comment, *Deadlock and Dissolution: Problems in the Closely Held Corporation in Illinois*, 56 NW. U.L. REV. 525, 533 (1961).

[19] *Id.* at 533-34.

[20] *Id.* at 534.

The Model Business Corporation Act allows shareholders to maintain an involuntary dissolution action when:

> the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and . . . irreparable injury to the corporation is being suffered or is threatened by reason thereof; or [when]
>
> . . . .
>
> . . . the shareholders are deadlocked in voting power, and have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors . . . .

Finally, one legal writer has suggested that at the very least the term "oppression" incorporates the common law grounds for involuntary dissolution: misconduct, gross mismanagement, failure of corporate purposes, abandonment, and dissension.[21] The author argues that oppression may occur when the minority's reasonable expectations of how the affairs of the corporation are to be conducted are not fulfilled. While these reasonable expectations would vary in each case and there would ordinarily be written evidence of the parties' intentions, reasonable expectations, for example, "that the corporation will be run honestly and ratably for the benefit of all the shareholders . . . [or] that the shareholder will be allowed to participate in management,"[22] could arise in the absence of any specific written agreement between the parties.[23] Other legal writers have subsequently endorsed the reasonable expectations test as a suitable vehicle for determining when the conduct of the majority or those in control becomes oppressive to minority shareholders.[24] To date, however, the courts have not adopted this test, although the results of at least two decisions are arguably consistent with the reasonable expectations analysis.[25]

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2 MODEL BUSINESS CORPORATION ACT ANNOTATED § 97 (2d ed. 1971). These provisions are identical or substantially equivalent to those found in most states where involuntary dissolution actions are permitted by statute. *E.g.*, ILL. ANN. STAT. ch. 32, § 157-86 (Smith-Hurd Cum. Supp. 1975-1976); MISS. CODE ANN. § 79-3-193 (1972); *see* 2 MODEL BUSINESS CORPORATION ACT ANNOTATED § 97, ¶ 3.01-.02 (2d ed. 1971). For discussions of these types of involuntary dissolution actions, see Note, *Minority Dissolution of the Close Corporation*, 35 GEO. WASH. L. REV. 1068 (1967); Annot., 13 A.L.R.2d 1260 (1950).

[21] Comment, *supra* note 3, at 130.

[22] *Id.* at 141.

[23] *Id.* at 135 n.35, 141.

[24] F. O'NEAL, "SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS—EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES §§ 7.15, 9.13, at 640 (1975); Afterman, *supra* note 14, at 1063-65; Prentice, *Protection of Minority Shareholders—Section 210 of the Companies Act 1948*, 25 CURRENT LEGAL PROBLEMS 124, 146 (1972). These models are based principally on oppressive conduct decisions in Great Britain. One student writer has suggested that the expectations of the shareholders be considered in light of partnership principles of "utmost good faith, fairness, and loyalty . . . ." Comment, *supra* note 16, at 422.

[25] In Compton v. Paul K. Harding Realty Co., 6 Ill. App. 3d 488, 285 N.E.2d 574 (1972), the court placed strong emphasis upon an informal shareholders' agreement in determining whether the affairs of a close corporation were being conducted as the shareholders had contemplated when forming the corporation.

In Long v. Norwood Hills Corp., 380 S.W.2d 451 (Mo. Ct. App. 1964), the plaintiff sought dissolution of a corporation which operated a country club on the grounds that the corporation was formed to make a profit and to distribute its profits to the shareholders through dividends, yet had failed to distribute any profits during its existence. After a lengthy review of testimony of several shareholders discussing their original purposes for forming the corporation and stating that they did not consider the purchase of stock to be an investment, the court affirmed the trial court's order denying dissolution of the corporation.

The courts' failure to adopt the reasonable expectations analysis may be due to the difficulty of determining in every instance what the shareholders' expectations are and upon what conversations, agreements, or documents their expectations are to be based. While written instruments which set forth the manner and degree of each party's participation, control, and investment may at times be available, in many instances the participants will not have entered into such an agreement. In the absence of some written instrument, the courts should hesitate before delving into the intentions and motives of the participants in the enterprise and determining whether, solely on the basis of the participants' testimony, the conduct of those in control was oppressive. A more fundamental objection may be that the reasonable expectations test does not account for any interests other than those of the corporate shareholders themselves. In determining whether oppression is so great as to warrant dissolution, the interests of non-shareholder employees, creditors, and the nature of the goods and services being offered to the public may be relevant to the inquiry.[26]

B. Re-Examining Selected Precedent

1. Two Early Decisions

Because of the abstract quality of the judicial definitions of oppressive conduct, an examination of several decisions is helpful in determining what factors must be present to warrant the dissolution remedy. *Gidwitz v. Lanzit Corrugated Box Co.*,[27] decided by the Illinois Supreme Court in 1960, is the first case in which statutory dissolution was granted solely because of the oppressive conduct of those in control of the corporation.[28] In *Gidwitz* stock ownership of the corporation was divided evenly between two families. Each family held two positions on the four-member board of directors. The company's president, Joseph Gidwitz, was "able to manage, operate, and control Lanzit almost as a sole proprietorship"[29] because he had taken office when harmony had existed

[26] Belcher v. Birmingham Trust Nat'l Bank, 348 F. Supp. 61, 147-53 (N.D. Ala. 1968); *In re* Radom & Neidorff, Inc., 307 N.Y. 1, 119 N.E.2d 563, 565 (1954); Jackson v. Nicolai-Neppach Co., 219 Ore. 560, 348 P.2d 9, 22 (1959); Comment, *supra* note 16, at 427-28.

[27] 20 Ill. 2d 208, 170 N.E.2d 131 (1960), *noted in* 74 HARV. L. REV. 1461 (1961); 30 U. CIN. L. REV. 478 (1961). Other discussions of *Gidwitz* may be found in Comment, *supra* note 13, at 366; Comment, *supra* note 18, at 530-34.

[28] In Long v. Wilson Stove & Mfg. Co., 277 Ill. App. 57, 82-84 (1934), the court set aside a sale of the corporation's assets to the corporation's president who was a member of the board of directors and a majority shareholder on the dual grounds that the sale was "oppressive and fraudulent" and also a "misapplication and waste" of the corporate assets. The court subsequently appointed a receiver to dissolve the corporation.

[29] 170 N.E.2d at 136.

between the two families and his family continued to support him with their half of the shares.

For 10 years prior to the suit, the defendant Gidwitz had refused to call an annual meeting of the shareholders at which Lanzit's board of directors was elected. The plaintiff shareholders called special meetings of the holdover board and special meetings of the shareholders in an attempt to increase the number of directors from four to five. These proposals were either ruled out of order by Gidwitz or the votes on these matters were split evenly between the two factions. Because of this deadlock, the plaintiffs were unable to participate in management of the corporation.

As president, Gidwitz was something less than a benevolent despot. He ignored the corporation's bylaws (1) in refusing to submit reports of the company's operations to the directors or the shareholders, (2) in hiring a person whose salary and duties were superior to any other corporate employee and at least equal to salaries and duties of the corporate officers, (3) in making increases and decreases in the salaries of corporate employees and officers without the board of directors' approval, (4) by executing a proxy to himself to vote the shares of a corporate subsidiary, and (5) by organizing without board authority a Lanzit subsidiary which had lost over $250,000. Moreover, Gidwitz violated a corporate resolution by borrowing money on Lanzit's behalf from a corporation in which he had a financial interest.[30]

The Illinois Supreme Court found that the "cumulative effect" of Gidwitz's improper acts, "the lack of majority control, and the denial to plaintiffs of their corporate rights and privileges" to participate in the management of the corporation's affairs constituted oppression, and held that the defendant's oppressive conduct, coupled with its "indicated continuing nature," warranted dissolution of the corporation.[31]

Polikoff v. Dole & Clark Building Corp.,[32] the first case to interpret the *Gidwitz* decision, provides an interesting contrast. In *Polikoff* the defendant corporation was organized 30 years before suit was filed, and its principal asset was real estate consisting of a building containing a theatre, nine stores, and a 65-room hotel. The corporation's capital structure consisted of 942.5 shares of class A stock and 1,015.2 shares of class B stock. The plaintiff purchased 15 shares (1.6 percent) of class A and 6 shares (0.6 percent) of class B, representing an investment of approximately $1,200, about 7 years before the suit was filed. The defen-

[30] *Id.* at 136-38.

[31] *Id.* at 138.

[32] 37 Ill. App. 2d 29, 184 N.E.2d 792 (1962). For a discussion of this decision, see Note, *supra* note 13, at 370-71.

dants owned 517.5 shares (55 percent) of class A and 767.7 shares (76 percent) of class B. Among other things the plaintiff alleged the following: Only once during the 7 years (1952-1958) of plaintiff's status as a shareholder had the corporation shown a profit. In 1958 the theatre had been closed and subsequently produced no income. In 1953 the defendant president's wife had loaned $60,000 to the corporation at 5 percent interest and was given a mortgage on the corporation's real estate holdings. Interest on the loan was paid as it became due, but repayment of the principal was extended from 1958 to 1963. Improvements totaling $60,000 were put into the corporation's building at a time when the corporation's ability to repay the mortgage was doubtful. The hotel was run inefficiently, and the defendant president had refused to follow the plaintiff's suggestions for management of the corporate affairs. Class A shares had not been redeemed and retired although the corporation had sufficient surplus to do so. The defendants had purchased corporate shares at depressed prices. Because of his wife's mortgage on the corporation's principal asset, the defendant president was "not in a position to exercise his fiduciary obligations . . . in the best interests of the corporation."[33]

In rejecting the plaintiff's contention that these allegations constituted oppressive conduct, the court noted that the "background against which these charges are to be considered is of extreme importance. That background is the routine organization of all corporate entities."[34] The court emphasized that corporate policy is established by vote of a majority of the shareholders through election of the board of directors and that persons holding stock in any corporation submit themselves to the majority rule.[35] The court further stressed that nearly every allegation of the plaintiff related to routine matters which were within the board of directors' and corporate officers' best business judgment to resolve.[36] The facts of *Gidwitz* were found to be "so disparate as to furnish no guide whatsoever to our decision . . . ."[37]

Arguably, because the facts in *Gidwitz* and *Polikoff* are "so disparate," the two decisions are instructive in an attempt to determine a threshold for oppressive conduct, *i.e.*, the point at which a minority shareholder's allegations of oppressive conduct will be given credence by a court. Ascertaining this threshold is important in view of the policy

[33] 37 Ill. App. 2d at 32-34, 184 N.E.2d at 793-94.

[34] *Id.* at 35, 184 N.E.2d at 795.

[35] *Id.* at 35-36, 184 N.E.2d at 795, *quoting* Wheeler v. Pullman Iron & Steel Co., 143 Ill. 197, 32 N.E. 420 (1892).

[36] 37 Ill. App. 2d at 37-38, 184 N.E.2d at 796.

[37] *Id.* at 36, 184 N.E.2d at 795.

considerations which arise when a minority shareholder brings a suit for involuntary dissolution of a corporation—whether the acts of the majority are so harsh as to warrant liquidation of an ongoing corporation with a sale of its assets likely yielding less than their fair value.

Gidwitz and *Polikoff* differ markedly in at least two ways: (1) the percentage of the opposing parties' investment and the probability that the minority shareholders would have been able to participate in management; (2) the types of acts assailed by the complaining shareholders. Some states have adopted statutory requirements that a shareholder or a combination of shareholders own a minimum percentage of the corporation's stock before being entitled to maintain an involuntary dissolution action.[38] Presumably, ownership requirements prevent disgruntled shareholders from bringing nuisance suits against a corporation. One writer argues that this type of statute is necessary where a state's corporation act does not distinguish between publicly held corporations and close corporations and suggests adopting a minimum ownership requirement of 10 percent.[39] Yet erecting an absolute requisite to maintaining an involuntary dissolution suit creates an artificial barrier unrelated to the statute's avowed purpose of prohibiting oppressive conduct.[40] The courts should, instead, have the discretion to determine whether a dissolution action is meritorious, with the percentage of shares held by the plaintiff-shareholder being only one factor to consider.

More important than the amount of stock held by a petitioning shareholder is whether the majority's oppressive conduct affects the complaining shareholder *qua* shareholder and not as a director, officer, or employee of the corporation.[41] This is necessary since the express language of the typical involuntary dissolution statute permits maintenance of the suit by plaintiff as shareholder and not in any other capacity.[42]

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[38] *E.g.*, CAL. BUS. & PROF. CODE § 4650 (West Supp. 1975); N.Y. BUS. CORP. LAW § 1104 (McKinney 1963).

[39] Comment, *Dissolution Under the California Corporation Code: A Remedy for Minority Shareholders*, 22 U.C.L.A.L. REV. 595, 618-19 (1975).

[40] *See* Israels, *The Sacred Law of Corporate Existence—Problems of Deadlock and Dissolution*, 19 U. CHI. L. REV. 778, 790 (1952).

[41] Campbell v. Ford Indus., Inc., 266 Ore. 479, 513 P.2d 1153, 1157 (1973); *see* Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131 (1960) (*passim*).

[42] *E.g.*, MISS. CODE ANN. § 79-3-193 (1972); VA. CODE ANN. § 13.1-94 (1973). The New Jersey and South Carolina Legislatures have recognized that, especially in the context of a close corporation, a majority's oppressive conduct can be as injurious to a person in the capacity of director, officer, or employee of the corporation as when the conduct affects a person's status as shareholder. Both states have adopted statutes which expressly provide that the courts may consider injury other than harm to the complaining shareholder's corporate rights and investment when determining whether the majority's conduct is

Preliminary inquiry into the percentage of the opposing parties' investments and whether the corporate activity complained of affects the plaintiff's role as a shareholder is appropriate before the courts delve into the difficult factual issues involved in any involuntary dissolution suit. Otherwise the suit may be used as a method for harassing the corporation and unduly burdening the court's time.

2. Two Recent Decisions

Once a minority shareholder establishes that its allegations of oppressive conduct are meritorious, the court must determine the more difficult question: Is the majority's conduct so oppressive as to warrant dissolution of the corporation? Examining two recent oppressive conduct decisions is beneficial in discussing this question.

In *White v. Perkins*,[43] the Virginia Supreme Court affirmed a chancellor's finding that the majority shareholder's acts toward the minority shareholder were oppressive. In 1967 White and Perkins negotiated to enter into a business as a jobber for American Oil Company products. Although Perkins suggested creating a partnership, White insisted upon a corporation with himself as majority shareholder. As a consequence, they invested $40,000 capital and formed P & W Oil Company (P & W Oil) with White holding 55 percent and Perkins holding 45 percent of the stock. Once P & W Oil entered into a leasing agreement with American Oil Company as the lessee of American's bulk plant and two of its service stations, White refused to lease his service station to P & W Oil as he had originally told Perkins he would.[44]

Because White and Perkins had taken a subchapter S election which necessitated their declaring 55 percent and 45 percent of the company's profits on their individual federal income tax returns, and because White would not approve the distribution of any corporate dividends, Perkins had to pay taxes on corporate profits he was not receiving. Perkins' financial problems were exacerbated because he was the corporation's sole full-time employee and his weekly salary was appparently his principal source of income. Although he knew that Perkins was

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oppressive. N.J. Rev. Stat. Ann. § 14A:12-7(1)(c) (Cum. Supp. 1975-1976); S.C. Code Ann. § 12-22.15(a)(4) (Supp. 1974). No reason exists, however, why a court in exercising its equity jurisdiction may not consider injury to the shareholder in these other roles once injury to a person in his capacity as shareholder is established. See text accompanying notes 62 through 67 *infra*.

[43] 213 Va. 129, 189 S.E.2d 315 (1972), *noted in Eighteenth Annual Survey of Developments in Virginia Law: 1972-1973*, 59 Va. L. Rev. 1400, 1412-16 (1973) [hereinafter cited as *Developments in Virginia Law*].

[44] 213 Va. at 130-31, 189 S.E.2d at 317.

having difficulty in meeting his financial obligations, White remained adamant in refusing to consent to any dividends, rejected Perkins' proposals that his stock ownership be increased to 50 percent, and declined Perkins' offers to sell White his interest in P & W Oil. During this period, in the face of Perkins' objections, White's service station incurred a large debt with P & W Oil. Finally, after Perkins told White he would attempt to dissolve P & W Oil, White asserted a colorable rental fee against the corporation, weakened Perkins' representation on the board of directors, and eventually terminated Perkins' employment with the corporation.[45] Although the Virginia Supreme Court rejected White's argument that he had used his best business judgment as a director of the corporation, it did not set forth any criteria by which his conduct was adjudged. The court simply affirmed the chancellor's finding of oppressive conduct noting that it was not "plainly wrong or without evidence to support it."[46]

Comparing *White* with *Baker v. Commercial Body Builders, Inc.*,[47] a 1973 Oregon Supreme Court decision, provides an interesting contrast in result between similar factual situations. In 1966 the defendants, Siler and his wife, formed Commercial Body Builders, Incorporated (Commercial). Commercial produced truck bodies, lift gates, and related truck equipment, an area in which Siler was familiar and experienced. In 1967, although the plaintiff Baker was not familiar with the business, he invested $14,210 in Commercial at Siler's suggestion. Baker and his wife received 98 shares of Commercial's stock, and Siler and his wife held 102 shares. In addition, Baker executed a $5,000 promissory note to Siler. The note was payable to Siler out of future corporate bonuses to corporate employees, including Baker. Monthly salaries were set with Siler receiving $800 for working full time, Siler's wife receiving $200 for working a 6 hour day, and Baker receiving $100 for being at the corporate office 1 day a week, during which time Baker transacted his personal business and made a few contacts and sales. The parties also entered into a buy-sell agreement requiring either party upon desiring to sell their stock to offer it to the other party at the lesser of the stock's market value or book value.[48]

During Commercial's fiscal years 1968 and 1969, the business was profitable. As a consequence, bonuses were paid to Baker, Siler, and Mrs. Siler, and their monthly salaries were increased. While Siler said that Baker was performing satisfactorily during this period, Baker was

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[45] *Id.* at 131-33, 189 S.E.2d at 317-19.

[46] *Id.* at 135, 189 S.E.2d at 320.

[47] 264 Ore. 614, 507 P.2d 387 (1973).

[48] 507 P.2d at 389.

not contacting anyone or making any sales for Commercial. Also, in fiscal 1969 Baker and Siler borrowed corporate money which they used as a down payment to purchase property adjacent to Commercial and which they subsequently leased back to Commercial.[49]

In fiscal 1969-1970 although Commercial's sales increased, the costs of doing business rose substantially. As a result, profits fell from $19,712.66 in the previous year to $269.52 in fiscal 1969-1970. The business relations between Baker and Siler deteriorated rapidly beginning in early 1970. Siler thought that during this period Baker was making too infrequent business contacts, spending too little time with the company, and charging unauthorized expenditures to Commercial's account. Baker testified, however, that Siler did not want him to contact large companies because their orders would be too great for Commercial to fill. Moreover, Baker said that Siler wanted him to sell his interest so that a person more experienced than Baker, a Mr. Ahren, could come into the business.[50]

During May and June of 1970, Baker, Siler, and Ahren entered into negotiations, contemplating Ahren purchasing either Siler's or Baker's interest in the business. Because Siler held the majority interest, Ahren offered Siler $45,000 for his stock while offering Baker only $22,500 for his 49 percent interest. Siler told Baker that Ahren might operate Commercial in an unprofitable manner if Siler sold his 51 percent interest. Siler also attempted to sell Baker his 51 percent interest. Baker would neither purchase Siler's stock nor tell Ahren his intentions of selling his stock. After these unsuccessful negotiations, Baker's employment as a salesman was terminated. He and his wife were voted out as directors and officers and were sent no further notices of shareholder meetings nor were they permitted to see the corporate records. While employed with Commercial, Baker had received a total of $10,475 in salary and bonuses, medical insurance coverage, and the use of a company car at a small rental fee.[51]

In late 1970 Siler, Ahren, and a Mr. Newall formed a corporation named Advanced Hydro Wreckers Manufacturing, Incorporated (Hydro) to produce wrecker equipment.[52] Hydro was created because Newall held various patents which prevented Commercial from otherwise producing the equipment. Although Commercial provided Hydro with office space, shop space, initial labor, and bookkeeping and managerial services, Baker was not consulted about the Hydro operation.

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[49] *Id.* at 389-90.

[50] *Id.* at 390.

[51] *Id.* at 390-91.

[52] *Id.* at 391.

Hydro ceased operating after a few months and at the time of the trial owed Commercial approximately $5,000. No proof existed that Commercial had suffered actual loss as a result of its dealings with Hydro, and the evidence indicated that Commercial was worth more at the start of the 1972 trial than when Baker was removed in June 1970.[53]

The Oregon Supreme Court initially noted that the question of the Silers' oppression of the Bakers as shareholders was separate from the question of Baker's oppression as an employee. Termination of Baker's employment was held not improper since the corporation existed before Baker's investment in it, Siler was the only shareholder with expertise in the business, and Siler's wife worked 30 hours a week as Commercial's bookkeeper, while Baker's principal contribution to the corporation was his investment. With respect to the Bakers' status as shareholders, the court concluded that the evidence did not support the Bakers' allegation that the Silers drained corporate profits by paying excessive salaries to themselves as employees. Conceding the Bakers' right to participate in corporate profits, the court found that the issue of whether dividend distribution was necessary because of the improper withholding of corporate profits had not been litigated during the trial. The court also found that although the Silers' advancing corporate funds to Hydro was "improvident," Hydro had not competed with Commercial, had paid reasonable fees to Commercial for services and working areas, and had not caused Commercial to suffer any ascertainable financial losses. Finally, while the Bakers' rights as shareholders had been infringed upon by prohibiting them access to corporate records and by not giving them any notice of the shareholders' meetings, these events occurred 2 years prior to trial and no evidence indicated these acts of the Silers would recur. Accordingly, while the Oregon Supreme Court found that some of the Silers' acts toward the Bakers had been oppressive, the Silers' conduct did not warrant dissolution of Commercial.[54]

C. A Proposed Model

Taken together, these four decisions suggest an appropriate analytical framework to be used in determining whether the majority's conduct is sufficiently oppressive to warrant corporate dissolution. A focus upon the following five factors appears to be appropriate: (1) the type of corporation involved; (2) the nature and amount of the complaining shareholder's investment; (3) the role of the opposing parties within the corporation; (4) the nature of the majority's conduct; and (5) the probability of the majority's acts recurring.

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[53] *Id.* at 391-92.

[54] *Id.* at 396-98.

The type of corporation involved—If a shareholder is dissatisfied with the manner in which management or those in control are conducting the corporation's affairs, the simple solution is to recoup the investment by selling the shares. The marketability of the complaining shareholder's interest is therefore critical. In any publicly held corporation a shareholder will usually be able to dispose of the stock easily. In contrast, a prudent investor will ordinarily be reluctant to purchase less than a majority interest in a close corporation,[55] especially at a time when the minority shareholder is being subjected to alleged oppressive conduct. Assuming that for some reason a prospective purchaser is not cognizant of the methods by which the majority is harassing the minority, marketability is further restricted because the minority shareholder could be in violation of Rule 10b-5[56] if he did not reveal his reasons for attempting to sell his stock.[57] Thus, the possibility of an oppressed mi-

[55] An example of this situation can be found in Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387, 390-91 (1973), where a prospective investor's offer to purchase 49 percent of the stock in a close corporation was $14,000 less than the book value of that percent of the shares. In *Baker*, the Oregon Supreme Court noted that "it is common knowledge that, as a practical matter," ownership of a minority interest is "worth considerably less than . . . book value . . . ." 507 P.2d at 398.

A principal characteristic of a close corporation is that its shares are not readily marketable. Other characteristics are that the corporation's shareholders are few in number and that the majority shareholders generally exercise a great deal of control as directors, officers, and employees in the corporation. Donahue v. Rodd Electrotype Co., ___ Mass. ___, 328 N.E.2d 505 (1975). For a collection of other definitions of the close corporation, see 1 F. O'NEAL, CLOSE CORPORATIONS § 1.02 (2d ed. 1971).

A plethora of material has been written on the problems peculiar to the close corporation. Commentary has dealt with how these problems may be avoided, *e.g.*, Hornstein, *Stockholders' Agreements in the Closely Held Corporation*, 59 YALE L.J. 1040 (1950); O'Neal, *Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting*, 65 HARV. L. REV. 773 (1952), or settled between the shareholders, *e.g.*, O'Neal, *Resolving Disputes in Closely Held Corporations: Intra-Institutional Arbitration*, 67 HARV. L. REV. 786 (1954); Note, *Mandatory Arbitration as a Remedy for Intra-Close Corporate Disputes*, 56 VA. L. REV. 271 (1970). These methods, however, all require foresight and expenditures of more money on the part of the persons forming the corporations and, unhappily, are not always used.

Upon a failure to resolve corporate conflicts peaceably, several writers have suggested that the courts apply different criteria to close corporations than are applied to publicly held corporations when determining whether dissolution of a close corporation is appropriate. *E.g.*, F. O'NEAL, *supra* note 24, §§ 9.01-15; Israels, *supra* note 40; Comment, *supra* note 16; Note, *supra* note 20. *But cf.* Chayes, *Madame Wagner and the Close Corporation*, 73 HARV. L. REV. 1532 (1960). For comprehensive treatments of the problems unique to the close corporation, see F. O'NEAL, CLOSE CORPORATIONS (2d ed. 1971); W. PAINTER, CORPORATE AND TAX ASPECTS OF CLOSELY HELD CORPORATIONS (1971).

[56] 17 C.F.R. § 240.10b-5 (1975), *promulgated under* 15 U.S.C. § 78j(b)(1970).

[57] *See, e.g.*, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969).

nority shareholder finding a willing purchaser for his interest in a close corporation is practically nonexistent. Also, a refusal to distribute corporate profits through dividends may be extremely burdensome to a minority shareholder if the close corporation has taken the subchapter S election.[58]

Even in the close corporation, opposing factors may dissuade a court from finding that the majority's conduct is so harsh as to warrant dissolution. The number of persons employed by the corporation and the probability of their obtaining some other type of employment upon dissolution is relevant in determining whether the majority's conduct is so insufferable that the minority's grievances should be redressed. Liquidating a corporation with a large work force may result in some or all of the corporate employees losing their jobs. This possibility may be significant enough to dissuade a court from applying the dissolution remedy.[59] Further, the type and nature of the goods and services which the corporation is offering to the public—whether production requires extensive training and expertise, whether the quality of the goods and services is high, and whether the type of goods and services produced is unique—may weigh against entrance of an order of dissolution.[60]

The amount and nature of the complaining shareholder's investment—In determining whether dissolution is necessary to protect a complaining shareholder's capital, both the amount of the shareholder's capital in absolute terms and the amount of the capital as a percentage of all the shareholders' capital are relevant.

The type of stock held by the complaining shareholder will indicate whether the shareholder simply desires a return on his investment or whether he further wants to participate actively in the corporation's affairs by voting at annual shareholder meetings and helping to formulate corporate policy. Accordingly, certain conduct by corporate management may be more injurious to a shareholder with non-voting preferred shares than to a shareholder holding common shares. For example, the siphoning of corporate profits through the payment of excessive salaries to the majority shareholder-employees may be more harsh to a minority preferred shareholder than to a minority shareholder-employee.[61] Denying common shareholders access to shareholder meet-

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[58] White v. Perkins, 213 Va. 129, 189 S.E.2d 315 (1972). The requirements of qualifying for the subchapter S election are found in INT. REV. CODE OF 1954, §§ 1371-77.

[59] Belcher v. Birmingham Trust Nat'l Bank, 348 F. Supp. 61, 152 (N.D. Ala. 1968); Jackson v. Nicolai-Neppach Co., 219 Ore. 560, 348 P.2d 9, 22 (1959); Comment, *supra* note 16, at 427-28.

[60] *See generally In re* Radom & Neidorff, Inc., 307 N.Y. 1, 119 N.E.2d 563 (1954).

[61] *See* Gray v. Hall, 10 Ill. App. 3d 1030, 295 N.E.2d 506 (1973); Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387, 394 (1973); *cf.* Compton v. Paul K.

ings to formulate corporate policy and denying them the right to vote their shares is oppressive conduct.[62]

The role of the opposing parties within the corporation—Both the majority and the minority shareholders may assume one or all of a variety of roles within a corporation. They are: (1) investor through contributions to equity; (2) creditor through the lending of money; (3) director through election by the shareholders; (4) officer through election by the directors; (5) employee through selection by the officers.

Under the typical involuntary dissolution statute, a minority shareholder must allege injury in his status as a shareholder.[63] Allegations of injury to a shareholder's status as a corporate employee, for example, are insufficient, without more, to bring the majority's conduct within the purview of the act.[64] Upon establishing the plaintiff's injury *qua* shareholder, it then becomes appropriate to consider which intracorporate roles of the minority shareholder are affected by the majority's allegedly oppressive acts. Weighing the impropriety of the majority's conduct against the probability of the complaining shareholder continuing to participate in other roles within the corporation is appropriate to ascertain whether the majority's conduct is sufficiently oppressive to merit corporate dissolution. For example, when a minority shareholder's source of income is solely dependent upon a salary as a corporate employee and receipt of dividends distributed from corporate profits, terminating the shareholder's employment without cause may in itself be so harsh as to require dissolution of the corporation.[65] If the minority shareholder's salary as an employee is essentially a sinecure, however, terminating the shareholder's employment is probably not oppressive when balanced against the shareholder's right to continue to receive corporate dividends.[66] When a minority shareholder's role with the cor-

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Harding Realty Co., 6 Ill. App. 3d 488, 285 N.E.2d 574 (1972); Ross v. 311 North Cent. Ave. Bldg. Corp., 130 Ill. App. 2d 336, 264 N.E.2d 406 (1970).

[62] Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131 (1960); Compton v. Paul K. Harding Realty Co., 6 Ill. App. 3d 488, 285 N.E.2d 574 (1972); Frerk v. Frerk, 39 Ill. App. 2d 401, 188 N.E.2d 773 (1963); Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387 (1973); White v. Perkins, 213 Va. 129, 189 S.E.2d 315 (1972); *cf. In re* Hedberg-Friedheim & Co., 233 Minn. 534, 47 N.W.2d 424 (1951).

[63] *E.g.*, Ill. Ann. Stat. ch. 32, § 157.86(a)(3) (Smith-Hurd Cum. Supp. 1975-1976); Miss. Code Ann. § 79-3-193(a)(2)(1972). At least two states expressly allow courts to consider injury to the minority shareholder's other intra-corporate roles. N.J. Rev. Stat. Ann. § 14A: 12-7(1)(c) (Cum. Supp. 1975-1976); S.C. Code Ann. § 12-22.15(a)(4) (Supp. 1974).

[64] Campbell v. Ford Indus., Inc., 266 Ore. 479, 513 P.2d 1153 (1973).

[65] *Compare* Campbell v. Ford Indus., Inc., 266 Ore. 479, 513 P.2d 1153 (1973), *and* White v. Perkins, 213 Va. 129, 189 S.E.2d 315 (1972), *with* Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387 (1973).

[66] Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387 (1973).

poration is one of an investor, whether obstructing the shareholder's rights either to participate in shareholders' mettings or to inspect corporate records is so oppressive as to warrant dissolution will depend upon the percentage of stock held by the minority in relation to all the outstanding common shares.[67]

The nature of the majority's conduct—In focusing upon the type of conduct alleged to be oppressive, it is appropriate to consider the majority's actions in the context of those doctrines underpinning all legitimate corporate activity: majority rule and business judgment.[68] By purchasing stock in a corporation a shareholder impliedly consents to adhere to corporate policies approved by the majority. Thus the minority may not ordinarily complain when his equity and influence are diluted by an issue of stock simply because he is unable to purchase a pro rata share of the issue. If, however, the corporation's bylaws vest the shareholders with preemptive rights, the decision to offer stock may be deemed oppressive where presented in a manner which abrogates the minority's opportunity to purchase, even though conducted under the guise of majority rule. For example, the offering may be ambiguously worded so as to lead the minority to believe that he must purchase either all or nothing of the offering. If presented at a time when the minority is financially unable to purchase the whole offering, this act of the majority would be oppressive.[69]

Insulating management from too rigid a scrutiny by the courts, the business judgment rule normally vests those in control with the discretion necessary to conduct the corporation's affairs without the fear of being harassed by malcontent shareholders. In the context of the close corporation, however, acts otherwise within the scope of the business judgment rule, such as the termination of employment,[70] the raising of corporate salaries,[71] and the distribution of dividends[72] must be viewed

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[67] *See* Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131 (1960); Frerk v. Frerk, 39 Ill. App. 2d 401, 188 N.E.2d 773 (1963); Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387, 397 (1973).

[68] For discussions of the two doctrines, see H. HENN, CORPORATIONS § 239 (majority rule), § 242 (business judgment rule) (2d ed. 1970). For an argument that the courts should use greater discretion in applying these two doctrines to close corporations, see F. O'NEAL, *supra* note 24, § 9.04.

[69] Browning v. C & C Plywood Corp., 248 Ore. 574, 434 P.2d 339 (1967).

[70] *See* Campbell v. Ford Indus., Inc., 266 Ore. 479, 513 P.2d 1153 (1973); Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387 (1973); White v. Perkins, 213 Va. 129, 189 S.E.2d 315 (1972).

[71] Compton v. Paul K. Harding Realty Co., 6 Ill. App. 3d 488, 285 N.E.2d 574 (1972); *see* Gray v. Hall, 10 Ill. App. 3d 1030, 295 N.E.2d 506, 509 (1973); Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387, 394 (1973).

[72] *See* Gray v. Hall, 10 Ill. App. 3d 1030, 295 N.E.2d 506 (1973); Compton v. Paul K.

in the context of how the majority, in inducing the minority to form or invest in the corporation, presented its intentions about these matters to the minority.

The probability of the majority's acts recurring—Those acts alleged to be oppressive by the minority must not be isolated incidents.[73] Even when a series of burdensome events have occurred, the conduct must be continuing in nature portending no possibility of abatement for the majority's conduct to be so oppressive as to warrant dissolution.[74]

As the five criteria indicate, oppressive conduct covers a multitude of corporate activities. While some types of conduct may be so inherently oppressive as to warrant dissolution, isolated oppressive acts by the majority normally will not serve as a catalyst to corporate dissolution. Some lesser remedy may be appropriate in redressing the complaining shareholder's injury. If the majority's oppressive conduct takes shape in several forms, however, corporate dissolution may be warranted. Yet any attempt to draw lines at which point dissolution is mandated would be arbitrary and unnecessary.[75] The proposed model attempts to delineate the more important criteria to be examined when an oppressive conduct case confronts the court. Its purpose is neither to expand nor restrict the range of corporate activities considered to be oppressive. Rather, the model suggests a method of measuring the cumulative effect of the majority's conduct when attempting to resolve the difficult, narrow issue of whether or not corporate dissolution is necessary.

Harding Realty Co., 6 Ill. App. 3d 488, 285 N.E.2d 574 (1972); Long v. Norwood Hills Corp., 380 S.W.2d 451 (Mo. App. 1964); White v. Perkins, 213 Va. 129, 189 S.E.2d 315 (1972).

[73] *See* Adolphus v. Zebelman, 354 F. Supp. 309 (E.D. Mo.), *aff'd*, 486 F.2d 1323 (8th Cir. 1973); Jesser v. Mayfair Hotel, Inc., 316 S.W.2d 465 (Mo. 1958).

[74] *See* Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131, 138 (1960); Central Stand. Life Ins. Co. v. Davis, 10 Ill. 2d 566, 141 N.E. 2d 45, 49-50 (1957); Compton v. Paul K. Harding Realty Co., 6 Ill. App. 3d 488, 285 N.E.2d 574, 581 (1972); Frerk v. Frerk, 39 Ill. App. 2d 401, 188 N.E.2d 773 (1963); *In re* Hedberg-Freidheim & Co., 233 Minn. 534, 47 N.W.2d 424 (1951); Handlan v. Handlan, 232 S.W.2d 944 (Mo. 1955); Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387, 394 (1973); White v. Perkins, 213 Va. 129, 189 S.E.2d 315 (1972).

[75] Several writers have suggested that when a minority shareholder petitions the court for involuntary dissolution of a corporation, dissolution principles equivalent to those used in dissolving partnerships should be applied. J. TINGLE, THE STOCKHOLDER'S REMEDY OF CORPORATE DISSOLUTION 65-76 (1959); Israels, *supra* note 40; Comment, *supra* note 16. *Contra*, Chayes, *supra* note 55, at 1545-49.

II. Remedying Oppressive Conduct

A. *The Equitable Power of the Court to Fashion Remedies*

Initially courts rejected the suggestion that they possessed the inherent power to dissolve a corporation at the petition of its shareholders.[76] The courts' rationale was that since a corporation was created under the imprimatur of the state, without express authority to order dissolution, the courts would not go behind the sovereign's act.[77] Exceptions to this principle developed, however, and the courts, under an exercise of their equity jurisdiction, would dissolve a corporation upon the shareholder's showing fraud by the majority.[78] Eventually the exceptions enveloped the general principle.[79] In 1940 Professor Hornstein celebrated the arrival of a "new rule—that equity has power [to dissolve a corporation] and will exercise it in appropriate cases . . . ."[80] Despite the optimism of this pronouncement, several jurisdictions continue to reject the argument that they possess the inherent power to dissolve a corporation. Accordingly, the courts' authority to afford a complaining shareholder relief from oppressive conduct in those states is based solely upon the applicable involuntary dissolution statute.[81]

While some jurisdictions have either expressly concluded[82] or noted

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[76] *E.g.*, Bayless v. Orne, 1 Miss. Rpts. 60, Freeman Ch. 161 (1840); Verplanck v. Mercantile Ins. Co., 6 N.Y. Ch. 68, 1 Edwards' Ch. 84 (1831); Strong v. McCogg, 55 Wis. 624, 629-30, 13 N.W. 895, 898 (1882).

[77] *E.g.*, Capital City Water Co. v. State *ex rel.* MacDonald, 105 Ala. 406, 18 So. 62 (1894) (quo warranto proceedings). The validity of this argument is suspect, under modern state corporations acts, however, since obtaining a corporate charter is essentially an administrative formality with corporations no longer receiving their charters by an express legislative act. Levant v. Kowal, 350 Mich. 232, 86 N.W.2d 336, 340 (1957); 47 Mich. L. Rev. 684, 686 (1949).

[78] *E.g.*, Brent v. B.E. Brister Sawmill Co., 103 Miss. 876, 60 So. 1018 (1910); Cantwell v. Columbia Lead Co., 199 Mo. 1, 97 S.W. 167 (1906).

[79] *E.g.*, Levant v. Kowal, 350 Mich. 232, 86 N.W.2d 336 (1957); *cf. In re* Lakeland Dev. Corp., 277 Minn. 432, 152 N.W.2d 758 (1967). The first decision in which a corporation was dissolved under a state court's inherent equity authority was Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N.W. 218 (1892).

[80] Hornstein, *A Remedy for Corporate Abuse—Judicial Power to Wind Up a Corporation at the Suit of a Minority Stockholder*, 40 Colum. L. Rev. 220, 220-21 (1940). For a discussion of the relevant Mississippi cases, see Comment, *The Power of an Equity Court to Dissolve a Corporation*, 15 Miss. L.J. 150 (1943).

[81] *E.g.*, Glickauf v. Moss, 23 Ill. App. 3d 679, 320 N.E.2d 132 (1974); *cf.* Turner v. Flynn & Emrich Co., 269 Md. 407, 306 A.2d 218 (1973).

[82] In White v. Perkins, 213 Va. 129, 189 S.E.2d 315 (1972), the Virginia Supreme Court reversed the chancellor's decree which had: (1) directed payment of a dividend to a minority shareholder; (2) disallowed certain claims of the majority shareholder against the defendant corporation; (3) awarded severance pay to the minority shareholder whose

in dicta[83] that the statutory remedy is exclusive, other jurisdictions have reached a contrary result and stressed that in the exercise of the court's equity jurisdiction, they are able to fashion less stringent remedies for oppressed shareholders.[84] One student writer has suggested that the issue of whether or not the statutory remedy of involuntary dissolution is exclusive is determined by whether the courts of a state possess the inherent equitable power to dissolve the corporation.[85] The implication is that if a jurisdiction possesses the inherent power of dissolution then it may formulate lesser equitable remedies; otherwise the courts within the jurisdiction are left to the sole remedy of dissolution. Yet this argument does not consider: (1) the nature of the involuntary dissolution statute itself, and (2) the nature of the dissolution remedy and considerations of policy which support the courts' exercise of less drastic forms of equitable relief.

Involuntary dissolution statutes have been interpreted as a legislative grant of authority to dissolve a corporation;[86] that is, the statutes extend the jurisdiction of the courts enabling them to hear a shareholder's petition for dissolution upon one of the grounds set forth in the statute. The courts, however, have not ipso facto applied the remedy upon a shareholder's alleging and proving the necessary jurisdictional

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position with the defendant corporation had been terminated; and (4) ordered that the account of another corporation owned by the majority shareholder be kept current with the defendant corporation. In rejecting the plaintiff's argument that the decree was within the inherent equitable powers of the chancellor, the court reasoned that since the Virginia Legislature had specifically amended the remedial provisions of the statute so that the state courts could either (1) decree dissolution or (2) appoint a custodian to conduct the corporation's affairs, the remedies were intended to be exclusive.

[83] In Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131 (1960), the Illinois Supreme Court, without expressly addressing the issue, found that defendant's conduct was oppressive and "entitle[d] plaintiffs to the *only remedy* provided by law—dissolution." 170 N.E.2d at 138 (emphasis supplied).

[84] *E.g.*, Kirtz v. Grossman, 463 S.W.2d 541, 545 (Mo. App. 1971); Browning v. C & C Plywood Corp., 248 Ore. 574, 434 P.2d 339 (1967). For a detailed list of alternate remedies short of dissolving a corporation, see the Oregon Supreme Court's discussion in Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387 (1973). *See also* F. O'NEAL, *supra* note 24, § 9.05.

[85] Comment, *supra* note 3, at 129 n.10. In Brent v. B.E. Brister Sawmill Co., 103 Miss. 876, 896, 60 So. 1018, 1022 (1913), the Mississippi Supreme Court held that the chancery courts of this state possess the inherent equitable power to dissolve a corporation. Therefore, under the author's reasoning, the Mississippi Chancery Courts would be able to invoke remedies other than dissolution. The decisional law of this state would appear to support this result. *Compare id., and* Hyman Mercantile Co. v. Kiersky, 192 Miss. 195, 4 So. 2d 881 (1941), *with* Duvall v. Duvall, 224 Miss. 546, 555, 80 So. 2d 752, 756 (1955).

[86] *E.g.*, Glickauf v. Moss, 23 Ill. App. 3d 679, 320 N.E.2d 132, 135 (1974); Jackson v. Nicolai-Neppach Co., 219 Ore. 560, 348 P.2d 9, 16 (1959). *But see In re* Lakeland Dev. Corp., 277 Minn. 432, 152 N.W.2d 758 (1967).

facts. The "drastic nature" of the dissolution remedy prevents mechanical applications of the statute.[87]

In *Jackson v. Nicolai-Neppach Co.*,[88] the plaintiffs alleged the existence of a shareholder deadlock, one of the bases for dissolution provided for under Oregon's involuntary dissolution statute.[89] The Oregon Supreme Court refused to dissolve the defendant corporation in spite of a voting deadlock among the shareholders which prevented the corporation's directors from being elected for 2 successive years. The court emphasized that the involuntary dissolution statute "contemplates . . . [that] a court will bring its discretion to bear in granting or refusing to grant equitable relief."[90] Otherwise, the court reasoned, the legislature would have phrased the involuntary dissolution statute in mandatory rather than permissive language.[91]

Because the statute is a legislative grant of jurisdiction to entertain involuntary dissolution suits, it can be argued that once the court's jurisdiction attaches, a finding that dissolution is inappropriate does not preclude granting other forms of equitable relief. Instead, the court retains the inherent equitable authority to redress the shareholder's grievances through relief short of dissolution.[92] As has been suggested in one legal periodical, perhaps the remedy of dissolution is designated as the only form of relief because it "represents a significant incursion into corporation sovereignty,"[93] permitting courts to continue to formulate less stringent equitable remedies for oppressed shareholders.

Another reason supporting a finding that dissolution is not an exclusive remedy lies in the drastic nature of dissolution itself.[94] Dissolution of a corporation entails liquidating the corporation and selling its assets at prices which generally will be less than their fair value. The stark consequences of liquidation—(1) loss of investment and employment to minority shareholders; (2) loss of capital, investment, and employment to majority shareholders; (3) loss of jobs for corporate

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[87] *See In re* Lakeland Dev. Corp., 277 Minn. 432, 152 N.W.2d 758 (1967); Jesser v. Mayfair Hotel, Inc., 316 S.W.2d 465 (Mo. 1958).

[88] 219 Ore. 560, 348 P.2d 9 (1959), *noted in* 39 ORE. L. REV. 382 (1960).

[89] ORE. REV. STAT. § 57.595 (1973).

[90] 348 P.2d at 16.

[91] *Id.* at 21; *see* Comment, *Involuntary Corporate Dissolution: A Comparison of Statutory Methods in California, Delaware, New York and Oregon*, 5 WILL. L.J. 639 (1969).

[92] Kirtz v. Grossman, 463 S.W.2d 541, 545 (Mo. App. 1971); Browning v. C & C Plywood Corp., 248 Ore. 574, 434 P.2d 339 (1967); *see* Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387 (1973). *But cf.* White v. Perkins, 213 Va. 129, 189 S.E.2d 315 (1972).

[93] *Developments in Virginia Law*, *supra* note 43, at 1414.

[94] Folk, *The Model Act and the South Carolina Law*, 15 S.C.L. REV. 275, 333-35 (1963). *See generally* D. DOBBS, REMEDIES § 1.2 (1973).

employees;[95] (4) elimination of a source of goods and services to the general public; (5) elimination of a source of competition within an industry or market with the potential for adverse consequences upon the market and the public;[96] (6) the possibility of deterring investments in small corporate businesses;[97] (7) the possibility of harm to corporate creditors[98]—prevent a mechanical approach to the problem. Yet, finding that dissolution is the sole authorized remedy when minority shareholders are being oppressed by the majority might result in: (1) the dissolution remedy being applied when lesser forms of equitable relief might remedy a shareholder's position, or (2) a court providing no equitable relief whatsoever because other factors outweigh dissolution in spite of the minority shareholder's untenable position.[99] Furthermore, the blunt instrument of dissolution cannot satisfactorily deal with the protean nature of oppressive conduct. While not suggesting that embittered shareholders should remain bound to each other by the knot of injunction,[100] absent irreconcilable differences, cases of oppressive conduct offer ample opportunity to provide lesser equitable remedies because of the variety of circumstances in which oppressive conduct can arise.[101]

Under their equity jurisdiction the courts have fashioned a wide range of remedies as alternatives to dissolving a corporation. Among those equitable remedies suggested or applied by the courts are: (1) an accounting;[102] (2) cancelling a stock issue designed to dilute a shareholder's interest;[103] (3) compelling the payment of dividends;[104] (4) com-

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[95] Belcher v. Birmingham Trust Nat'l Bank, 348 F. Supp. 61, 147-53 (N.D. Ala. 1968); Jackson v. Nicolai-Neppach Co., 219 Ore. 560, 348 P.2d 9, 22 (1959); Comment, *supra* note 16, at 427; Comment, *supra* note 18, at 536.

[96] For a statistical analysis of the impact small corporations have upon the American economy in relation to other business entities, see SENATE SMALL BUSINESS COMMITTEE, THE U.S.A. BUSINESS COMMUNITY: ITS COMPOSITION AND CHANGING NATURE WITH SPECIAL REFERENCE TO SMALL BUSINESS, S. REP. NO. 1168, 93d Cong., 2d Sess. (1974).

[97] F. O'NEAL, *supra* note 24, § 1.04.

[98] Comment, *supra* note 16, at 427-28.

[99] *Developments in Virginia Law, supra* note 43, at 1415.

[100] *See* Chayes, *supra* note 55, at 1535-45.

[101] O'Neal, *Oppugnancy and Oppression in Close Corporations: Remedies in America and in Britain*, 1 B.C. IND. & COM. L. REV. 1, 2-3 (1959); Note, *Remedies for Oppression in Close Corporations in Indiana*, 41 IND. L.J. 256, 258-59 (1966). For the definitive treatment on the variety of methods used by the majority to oppress minority shareholders, see F. O'NEAL, *supra* note 24.

[102] Hill v. Bellevue Gardens, Inc., 190 F. Supp. 760 (D.D.C. 1960), *aff'd*, 297 F.2d 185 (D.C. Cir. 1961); Compton v. Paul K. Harding Realty Co., 6 Ill. App. 3d 488, 285 N.E.2d 574 (1972); Stott Realty Co. v. Orloff, 262 Mich. 375, 247 N.W. 698 (1933); Thwing v. Minowa Co., 134 Minn. 148, 158 N.W. 820 (1916).

[103] Browning v. C & C Plywood Corp., 248 Ore. 574, 434 P.2d 339, 343 (1967).

[104] Thwing v. Minowa Co., 134 Minn. 148, 158 N.W. 820 (1916); Patton v. Nicholas, 154 Tex. 385, 279 S.W.2d 848 (1955); *see* Hockenberger v. Curry, 191 Neb. 404, 215 N.W.2d

pelling sale of stock for a price at which other shareholders were able to purchase;[105] (5) compelling payment of fair value for minority shareholder's stock;[106] (6) damages for injury suffered as a shareholder as a result of the majority's oppressive conduct;[107] (7) injunction of the majority's oppressive acts;[108] (8) ordering the sale of stock of one faction to the other with the corporation being liquidated and dissolved upon failure to comply with the order;[109] (9) receivership or appointment of a fiscal agent until the differences between the groups are resolved;[110] (10) reduction of the corporation's capital through sale of corporate assets to the minority;[111] (11) removal of majority shareholders from the positions of director and officer;[112] and (12) retaining jurisdiction over the corporation to review its earnings dividend record.[113]

The form of equitable relief granted by a court to resolve oppression of a minority shareholder will depend upon the facts and circumstances of each case. Professor Dobbs has persuasively argued that in fashioning remedies the court should select those remedies which are consistent with the substantive law and further its policies.[114] The manifest purpose in forbidding oppressive conduct is to ensure that the majority shareholders will deal with the minority fairly and ethically.[115] Selecting lesser remedies as an alternative to corporate dissolution in instances when the majority is oppressing the minority merely furthers the substantive policy of the involuntary dissolution statute.

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627 (1974). For a proposal that states adopt statutes entitling shareholders to bring suits to compel the payment of corporate dividends, see F. O'NEAL, *supra* note 24, § 9.06. *See generally* Note, *Minority Shareholder Suits to Compel Declaration of Dividends*, 64 HARV. L. REV. 299 (1950).

[105] Browning v. C & C Plywood Corp., 248 Ore. 574, 434 P.2d 339, 343 (1967).

[106] Kirtz v. Grossman, 463 S.W.2d 541, 545 (Mo. App. 1971).

[107] Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387, 396 (1973); Browning v. C & C Plywood Corp., 248 Ore. 574, 434 P.2d 339, 343 (1967); *see* Campbell v. Ford Indus., Inc., 266 Ore. 479, 513 P.2d 1153, 1157 (1973).

[108] Adolphus v. Zebelman, 354 F. Supp. 309 (E.D. Mo.), *aff'd*, 486 F.2d 1323 (8th Cir. 1973); Jesser v. Mayfair Hotel, Inc., 316 S.W.2d 465 (Mo. 1958).

[109] Handlan v. Handlan, 232 S.W.2d 944 (Mo. 1950); Strong v. Fromm Lab., Inc., 273 Wis. 159, 77 N.W.2d 389 (1956).

[110] Handlan v. Handlan, 232 S.W.2d 944 (Mo. 1950); Roach v. Margulies, 42 N.J. Super. 243, 126 A.2d 45 (1956); Guaranty Laundry Co. v. Pulliam, 200 Okla. 185, 191 P.2d 975 (1948), *noted in* 47 MICH. L. REV. 684 (1949).

[111] Belcher v. Birmingham, 348 F. Supp. 61, 147-53 (N.D. Ala. 1968); Riley v. Callahan Mining Co., 28 Idaho 525, 155 P. 665 (1916).

[112] Thwing v. Minowa Co., 134 Minn. 148, 158 N.W. 820 (1916).

[113] Hockenberger v. Curry, 191 Neb. 404, 215 N.W.2d 627, 628 (1974).

[114] D. DOBBS, *supra* note 94, § 1.2.

[115] Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387 (1973).

B. Statutory Relief Other Than Dissolution

Several state legislatures have adopted statutes empowering the courts to provide remedies other than corporate dissolution for oppressive conduct by majority shareholders.[116] Patterning its legislation after Section 210 of the English Companies Act of 1948,[117] South Carolina was the first state to enact such a statute, doing so in 1962.[118] The South Carolina statute provides that in shareholder suits to dissolve a corporation, the court in its discretion may grant relief other than dissolution,

> including, without limitation, an order
>
> (1) Cancelling or altering any provision contained in the articles of incorporation, or any amendment thereof, or in the bylaws of the corporation;
>
> (2) Cancelling, altering, or enjoining any resolution or other act of the corporation;
>
> (3) Directing or prohibiting any act of the corporation or of shareholders, directors, officers, or other persons party to the action . . . .[119]

Michigan, North Carolina, and New Jersey have since enacted similar provisions,[120] and other states have adopted statutes which provide for less sweeping forms of relief.[121]

Although many courts have exercised their equitable power in fashioning remedies for oppressed minority shareholders,[122] those states which permit dissolution of a corporation for oppression of minority shareholders should nonetheless adopt a statute providing lesser remedies. Some of the remedies set forth in a statute such as South Carolina's, for example, cancelling provisions of the corporate charter, are unlike any exercised previously by courts under their equity jurisdiction. Despite recognition of its equitable power to offer relief short of dissolution, without statutory direction a court might be reluctant to use some types of remedies because of their singular nature. More important,

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[116] *E.g.*, MICH. COMP. LAWS ANN. § 450.1825(2) (1973); N.J. REV. STAT. ANN. § 14A:12-7 (Cum. Supp. 1975-1976); N.C. GEN. STAT. § 55-125.1 (Repl. Vol. 1975); S.C. CODE ANN. § 12-22.23 (Supp. 1974); VA. CODE ANN. § 13.1-94 (Repl. Vol. 1973).

[117] English Companies Act, 1948, § 210. For discussions of this provision, see F. O'NEAL, *supra* note 24, § 9.12; Afterman, *supra* note 14; Prentice, *supra* note 24.

[118] South Carolina Business Corporation Act of 1962, No. 847, § 12.23, [1962], S.C. Acts § J. Res. p. 2110.

[119] S.C. CODE ANN. § 12-22.23 (Supp. 1975).

[120] MICH. COMP. LAWS ANN. § 450.1825(2) (1973); N.J. STAT. ANN. § 14A-12-7 (Cum. Supp. 1975-1976); N.C. GEN. STAT. § 55-125.1 (Repl. Vol. 1975).

[121] *E.g.*, VA. CODE ANN. § 13.1-94 (Repl. Vol. 1973) (court may either dissolve the corporation or appoint a custodian).

[122] See text accompanying notes 102 through 113 *supra*.

while some jurisdictions have taken the position that they possess the equitable power to grant remedies for majority oppression other than dissolution, others have not.[123] In most jurisdictions, including Mississippi,[124] the issue has not been resolved. Therefore, adoption of a statute providing for alternate forms of relief would ensure alleviation of minority oppression by the majority through means other than dissolution. Because of the difficult policy considerations which must be made in determining whether to dissolve a corporation, the legislature should aid the courts by offering remedies other than a dissolution decree.

In those states in which corporate law voting requirements are greater than a simple majority,[125] or the close corporation is a prevalent mode for conducting business,[126] or in any close corporation in which the bylaws mandate high quorum and voting requirements or enable a single shareholder to veto various corporate acts, the potential for oppression by majority shareholders is great. This results from the fact that since the minority can more easily block the majority's plans, if it becomes dissatisfied with corporate policy, there is a greater likelihood that the majority will retaliate through oppressive conduct. Statutes such as the one South Carolina has adopted would therefore be helpful in allowing the courts to remedy these oppressive situations by some means other than dissolving the corporation. Finally, most commentators have argued that enactment of statutes providing remedies other than corporate dissolution are a deterrent to oppressive conduct by the majority.[127] While such statements are difficult to prove, it is curious that in those states with statutes providing for alternative forms of relief litigation is practically nonexistent.

CONCLUSION

Providing minority shareholders relief from oppressive conduct of majority shareholders is a relatively recent development in corporate law. Although in several instances the courts have found the majority shareholders' conduct to be sufficiently oppressive to warrant dissolving the corporation, the courts have been exceedingly reluctant to set forth

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[123] See text accompanying notes 82 & 83 *supra*.

[124] See note 85 *supra*.

[125] *See* Hodge & Perry, *The Model Business Corporation Act: Does the Mississippi Version Lime the Bushes?* 46 MISS. L.J. 371, 382-85 (1975). *See generally* Folk, *supra* note 94, at 334.

[126] *See* SENATE SMALL BUSINESS COMMITTEE, *supra* note 96.

[127] *E.g.*, F. O'NEAL, *supra* note 24, § 9.09, at 612; Afterman, *supra* note 14, at 1077 n.147; Baxt, *Oppression of Shareholders—The Australian Remedy*, 8 MELBOURNE U. L. REV. 91, 104 & n.55 (1971).

the facts contributing to their conclusion. The model proposed in this comment treats those factors, however implicit they may be, which appear to run throughout these decisions. This model is not an attempt to broaden the scope of oppressive conduct as much as it is an attempt to determine when the majority's conduct is and is not oppressive. Considering the elements suggested—(1) the type of corporation involved; (2) the nature and amount of the shareholder's investment; (3) the role of the opposing parties within the corporation; (4) the type of conduct complained of; and (5) the probability of the majority's acts recurring—will hopefully be beneficial in resolving this issue.

While dissolution of the corporation will not be warranted in every instance, especially when considering the many factors weighing against dissolution, the majority's conduct may nonetheless be oppressive to the minority. Ample authority exists establishing the courts' inherent equitable power to provide remedies short of dissolution. Viewing involuntary dissolution as a permissive, yet harsh, remedy, the courts should not hesitate to impose lesser remedies to aid oppressed shareholders in those situations when dissolution is inappropriate.

Notwithstanding the courts' power to create special equitable remedies, various state legislatures have adopted sensible alternate remedies which courts may otherwise be reluctant to apply because of their novelty. Each legislature which provides by statute for no remedy other than dissolution upon a shareholder's allegations of oppressive conduct should therefore consider the merits of adopting a statute which expressly grants their state courts the authority to provide lesser remedies.

John Henegan

STANDING TO SUE UNDER SECTION 4 OF THE CLAYTON ACT: DIRECT INJURY, TARGET AREA, OR TWILIGHT ZONE

The Supreme Court has not passed directly on the standing to sue issues in federal antitrust litigation.[1] It has been left to the courts of appeals to set guidelines for the conferral of standing under section 4 of the Clayton Act, which authorizes private treble-damages actions for violations of the federal antitrust laws. Section 4 of the Clayton Act provides in part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained . . . .[2]

Generally, the lower federal courts, in interpreting the "by reason of" language, have effectively limited the class of potential antitrust plaintiffs. The courts have imposed the additional burden on an antitrust plaintiff to establish either "direct injury"[3] from the putatively illegal conduct or presence in the "target area"[4] of the alleged antitrust violation. These rulings have been made despite contrary public-judicial policy which clearly favors vigorous private enforcement of the antitrust laws.[5]

An irreconcilable split currently exists among the courts of appeals on the issue of standing in private antitrust cases.[6] The result is perhaps

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[1] The Supreme Court had consistently denied certiorari in private antitrust cases squarely presenting the standing issues under section 4 of the Clayton Act. 15 U.S.C. § 15 (1970). *E.g.*, Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *see* Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073, 1076 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

Recently, the Court was presented with the opportunity to settle the law of standing under section 4 of the Clayton Act, but it declined to accept the invitation. Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 855 (1976).

[2] Clayton Act § 4, 15 U.S.C. § 15 (1970).

[3] See text accompanying notes 41 through 64 *infra*.

[4] See text accompanying notes 65 through 82 *infra*.

[5] *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138-39 (1968)(presence of private action furthers purposes of antitrust laws).

[6] *See* Beane, *Antitrust: Standing and Passing On*, 26 BAYLOR L. REV. 332, 352 (1974). The First, Third, and Tenth Circuits have generally applied the direct injury approach: standing is granted only if the private antitrust plaintiff can establish direct injury stemming from the alleged illegal acts of the defendant. *E.g.*, Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 732-34 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299, 302 (D. Mass.), *aff'd*, 242 F.2d 758 (1st Cir. 1957)(per curiam).

best described as "judicial picking and choosing." Depending upon the subjective approach taken by an individual forum, standing may or may not be granted under indistinguishable factual situations.[7] The private antitrust claimant deserves more predictable guidelines within which to function; he should not be subjected to the whims of the courts in every treble-damages action.

I. An Article III Analysis

The boundaries for the limited jurisdiction of the federal courts have been erected by article III, section 2, of the Constitution.[8] Accordingly, the threshold question in every federal case involves a determination of the court's power to entertain the suit. The propriety of judicial intervention, however, is not wholly dependent upon satisfaction of the case or controversy requirement of article III. Within this constitutional stricture, considerable discretion remains with the forum court to assess independently the appropriateness of its exercise of jurisdiction and its

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The Eighth and Ninth Circuits have consistently applied the target area test: the antitrust plaintiff is recognized as possessing the requisite standing if he falls within the sector of the economy in which the alleged violation threatens a breakdown of competitive conditions. *E.g.*, Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 125-30 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). The Second, Fourth, Fifth, and Seventh Circuits have formulated "hybrid" approaches. *E.g.*, Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co., 497 F.2d 1151, 1153-54 (2d Cir.), *cert. denied*, 419 U.S. 968 (1974); Battle v. Liberty Nat. Life Ins. Co., 493 F.2d 39, 48-49 (5th Cir.), *cert. denied*, 419 U.S. 1110 (1974); 2361 State Corp. v. Sealy, Inc., 402 F.2d 370 (7th Cir. 1968); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 417-20 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

The Second Circuit has its own internal conflict. *Compare* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971)(plaintiff must show that the antitrust violations are the proximate cause of his injury), *with* GAF Corp. v. Circle Floor Co., 463 F.2d 752, 758-59 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973) (plaintiff must sustain injury to "competitive position"), *and* Carnivale Bag Co., Inc. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287, 294 (S.D.N.Y. 1975) (the target area concept includes a general requirement that the harm to plaintiffs not be incidental).

Recently, the Sixth Circuit in Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975), adopted the bifurcated standing test of Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970), focusing on "injury in fact" and the protected "zone of interests."

[7] *Compare* Field Prods., Inc. v. United Artists Corp., 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 1010 (2d Cir. 1970) (per curiam), *cert. denied*, 401 U.S. 949 (1971), *with* Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971). In similar factual settings, the plaintiff in *Field Productions* was denied standing, while standing to sue was accorded the *Mulvey* complainant. *See generally* Comment, *Standing Under Clayton § 4: A Proverbial Mystery*, 77 Dick. L. Rev. 73, 83-87 (1973).

[8] U.S. Const. art. III, § 2.

employment of remedial powers. The jurisdictional concept of justiciability, therefore, encompasses not only the constitutional limitations on federal court jurisdiction but also judicial discretion.[9]

> Concepts of justiciability have been developed to identify appropriate occasions for judicial action, both as a matter of defining the limits of the judicial power created by Article III of the Constitution, and as a matter of justifying refusals to exercise the power even in cases within the reach of Article III.[10]

Similarly, the question of standing to invoke federal jurisdiction is two-dimensional. Both constitutional limitations under article III's case or controversy requirement and prudential limitations relating to "judicial self-governance" are involved.[11] Standing, therefore, may be properly characterized as a subset of justiciability along with the related doctrines of ripeness, mootness, advisory opinions, and political questions.[12] Unlike other doctrines developed to assist the courts in adjudicating disputes, however, the standing inquiry focuses upon the relation between the particular plaintiff and the issues he desires to litigate, rather than the merits of the case or the appropriateness of the issues for judicial resolution.[13]

A case, in the article III sense, must present a real controversy since the judicial power exists only to prevent or remedy injury to the plaintiff.[14] Standing in this constitutional dimension is designed to ascertain whether the complaining party has sufficient stake in the resolution of a particular controversy to ensure that the dispute sought to be adjudicated will be presented in a context of adverseness satisfying the case or controversy requirement of article III.[15] In its fundamental aspect, standing attempts to identify the proper litigant in a suit through distinguishing plaintiffs with a direct stake in the outcome of the litiga-

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[9] *E.g.*, Barrows v. Jackson, 346 U.S. 249, 255-56 (1953).

[10] 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3529, at 146 (1975)(footnote omitted).

[11] Warth v. Seldin, 422 U.S. 490, 498 (1975). It is clear, however, that the policy limitations on standing are not always readily distinguishable from their constitutional counterpart. Tax Analysts & Advocates v. Simon, 390 F. Supp. 927, 942 (D.D.C. 1975), *citing* Flast v. Cohen, 392 U.S. 83, 97 (1968).

[12] 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10; *see* Warth v. Seldin, 422 U.S. 490, 499 n.10 (1975). *See also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154-56 (1951) (Frankfurter, J., concurring); Ashwander v. TVA, 297 U.S. 288, 346-48 (1936)(Brandeis, J., concurring).

[13] Flast v. Cohen, 392 U.S. 83, 99 (1968); *see* Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 153 (1970).

[14] Warth v. Seldin, 422 U.S. 490, 499 (1975).

[15] Flast v. Cohen, 392 U.S. 83, 99 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962).

tion from mere concerned bystanders. The requisite "personal stake" in the resolution of the dispute is conditioned upon plaintiff's establishment of "injury in fact": that he has been or will in fact be perceptibly harmed. It follows that standing, when viewed as a prerequisite to a federal court's exercise of jurisdiction under article III, is dependent upon a plaintiff's suffering some threatened or actual injury to a judicially cognizable interest. Recent decisions have recognized expanded genres of personal stakes or interests as sufficient to confer standing even though the plaintiff incurred only a scintilla of harm.[16] While the categories of protected interests which may be asserted in support of standing have been broadened, the requirement nevertheless remains that the party seeking judicial resolution of the controversy must be among the injured.[17]

In its nonconstitutional dimension, the standing inquiry involves the propriety of judicial restraint in light of "prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving . . . disputes."[18] Within the limits of their article III prescribed jurisdiction, the federal courts have considerable discretion in placing further restrictions on the class of claimants who may invoke the judicial decisional and remedial power. The courts have accordingly employed the standing doctrine as a screening device to deny plaintiffs access to the courts where the harm asserted is a generalized grievance common to the public at large. This practice is followed even though the case involves an actual controversy within the purview of article III since

> [i]t may be questioned whether, if the entire citizenry is aggrieved by official action, they may seek judicial relief instead of following the political route accorded by the democratic process.[19]

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[16] *E.g.*, United States v. SCRAP, 412 U.S. 669 (1973)(recreational interests); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208 (1972)(intellectual outrage derived from discriminatory housing practices); McGowan v. Maryland, 366 U.S. 420 (1961)(spiritual stake in first amendment values); *see* Sierra Club v. Morton, 405 U.S. 727 (1972) (aesthetic and conservational interests).

[17] In Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973), the Court concluded:

> Broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have himself suffered an injury.

See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-67 (1972); Sierra Club v. Morton, 405 U.S. 727, 735, 738 (1972); Flast v. Cohen, 392 U.S. 83, 101 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962); *cf.* Laird v. Tatum, 408 U.S. 1, 13 (1972).

[18] Warth v. Seldin, 422 U.S. 490, 500 (1975).

[19] Healy v. Edwards, 363 F. Supp. 1110, 1112 (E.D. La. 1973), *vacated*, 421 U.S. 772 (1975).

> [S]tanding to sue may not be predicated upon an interest . . . which is held

The courts have also denied standing to plaintiffs seeking a forum to vindicate the rights or interests of third persons rather than their own.[20] Similarly, the judicial self-governance aspect of standing allows the assertion of harm to the public interest only after the litigant has established standing in his own right.[21] In sum, although the primary purpose of the law of standing is to guard against improper plaintiffs, the courts have exercised the discretionary dimension of the doctrine to limit the breadth of judicial intervention, particularly in cases presenting issues of wide public significance.[22]

Although article III provides the defined limits of the judicial power, it remains for Congress to allocate this power by granting or withholding federal jurisdiction in certain types of cases.[23] Where Congress has exercised its constitutional prerogative by statute, the standing inquiry becomes one of statutory interpretation and application: whether the statute accords the particular plaintiff a right to judicial relief. Essentially, Congress, through enabling legislation, can predetermine the proper party to bring suit for the invasion of statutorily created rights, provided article III's minimum requirement of actual or threatened injury is retained as a criterion.[24]

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in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share.

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974); *e.g.*, United States v. Richardson, 418 U.S. 166, 176-79 (1974); *Ex parte* Levitt, 302 U.S. 633, 634 (1937).

[20] It is a general rule of litigation that one may not assert the rights of third parties (*jus tertii*). Standing under this doctrine should be granted only when the claimant, if not relieved of a challenged legal obligation imposed on him or of the effects of such an obligation imposed on others, will act in such a way as to deny third parties their constitutional rights. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 458-59 (1958); Barrows v. Jackson, 346 U.S. 249, 257-59 (1953); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 435 (1974).

[21] Sierra Club v. Morton, 405 U.S. 727, 737 (1972); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940).

[22] *See* Warth v. Seldin, 422 U.S. 490, 500 (1975).

[23] U.S. CONST. art. I, § 8; *see* Palmore v. United States, 411 U.S. 389, 401 (1973). *See also* Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845).

[24] In O'Shea v. Littleton, 414 U.S. 488, 493-94 n.2 (1974), the Supreme Court recognized that it has been

> previously noted that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute. See, *e.g., Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (WHITE, J., concurring); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968)." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). But such statutes do not purport to bestow the right to sue in the absence of any indication that invasion of the statutory right has occurred or is likely to occur. . . . *Perforce, the constitutional requirement of an actual case or controversy*

II. A Statutory Analysis

Congress in section 4 of the Clayton Act exercised its constitutional power to define the select class of persons who may maintain a private action for damages under any of the substantive antitrust provisions.[25] According to section 4, any person injured in his "business or property by reason of" a violation of the antitrust laws may invoke the jurisdiction of the federal courts in a private damage suit. Additionally, the statute authorizes recovery by the successful plaintiff of treble damages and attorneys' fees. The threshold requirement of standing in private antitrust cases is therefore statutory. By the terms of section 4, two requirements must be satisfied before standing is conferred upon the potential treble-damages plaintiff: (1) The plaintiff must sustain an injury to his "business or property," and (2) such injury must be occasioned "by reason of" the defendant's antitrust violations.[26] The broad language of the statute reflects the similarly expansive congressional purpose in providing a private remedy for antitrust violations: to supplement the enforcement mechanisms exclusive to governmental entities.[27] It is clear, however, that since section 4 distinguishes between classes of potential plaintiffs on the basis of injury, the statutory grant of standing to sue under the antitrust laws comports with the minimum constitutional requirement of injury in fact.

Apart from section 4's express compliance with the constitutional dimension of standing to invoke the judicial power under article III, the

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remains. [A federal plaintiff] still must show actual or threatened injury of some kind to establish standing in the constitutional sense.

Id. at 493-94 n.2 (emphasis added); *see* Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972).

[25] According to section 1 of the Clayton Act, 15 U.S.C. § 12 (1970), the term "antitrust laws" includes the Sherman Act, the Clayton Act, specified sections of the Robinson-Patman Act, and the Wilson Tariff Act. Private actions under the Federal Trade Commission Act and section 3 of the Robinson-Patman Act are disallowed. Monroe, *Alternative Courses of Action Available to Persons Injured Under the Antitrust Laws,* 34 Ohio St. L.J. 465, 466 (1973); *see* Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958).

[26] Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39, 48 (5th Cir.), *cert. denied,* 419 U.S. 1110 (1974); *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973); *see* Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 & n.14 (1972).

The Supreme Court has limited the term "business or property" to interests in commercial ventures or enterprises. Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972).

[27] Enforcement of the antitrust laws has been delegated by statute to a tripartite scheme consisting of the Department of Justice, the Federal Trade Commission, and the private sector. For a comprehensive analysis of the federal enforcement mechanism, see *Joint Hearing on S. 1136 & S. 449 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary and the Subcomm. for Consumers of the Senate Commerce Comm.,* 94th Cong., 1st Sess. (1975).

statutory language implicitly directs the courts to make a policy determination within the bounds of judicial discretion. Not only must the private antitrust plaintiff assert injury to his business or property, but also he must assert that the harm was caused "by reason of" an alleged violation of the antitrust laws. It is not surprising that the courts have seized upon the statute's causation language to erect prudential limitations on the exercise of federal jurisdiction in private antitrust cases. The existence of a direct relation between the alleged injury and the claim sought to be adjudicated has been judicially incorporated as a standing requirement under section 4. Where the causal linkage between the plaintiff's injury and the asserted antitrust violation becomes attenuated, the courts have generally denied standing, deeming the dispute particularly inappropriate for judicial resolution without regard to the existence of an actual controversy within the meaning of article III. Disagreement exists among the courts, however, as to the directness necessary to render actionable the causal relation between the purported antitrust violation and the plaintiff's injury.

III. Judicial Interpretation

A. A Policy Analysis

The increase in litigation of standing issues in private antitrust actions primarily emanates from the multileveled distributive chain which characterizes the existing product market in the United States.[28] Since the members of the distribution scheme from manufacturer to consumer represent a substantial class of potential antitrust plaintiffs, a standing doctrine unique to private damages suits under section 4 of the Clayton Act has developed in response to two competing policy considerations: vigorous enforcement of the antitrust laws versus the need to bar frivolous claims brought by those seeking the windfall of treble damages because of incidental harm, or for the purpose of coercing settlement.[29]

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[28] Beane, *supra* note 6, at 332.

[29] *E.g.*, Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

> [T]he basic and underlying purposes of the anti-trust laws [are] to preserve competition and to protect the consumer. Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm.

Id. at 55; *see* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 197 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 Colum. L. Rev. 570, 585 (1964).

The Supreme Court has specifically directed that the premier antitrust law, the Sherman Act,[30] is comprehensive in its terms and coverage, protecting not only consumers, purchasers, competitors, or sellers, but "all who are made victims of the forbidden practices by whomever they may be perpetrated."[31] The private enforcement mechanism embodied in section 4 of the Clayton Act is necessarily equally broad in scope. Accordingly, following the policy that courts should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in the antitrust laws, the Court has concluded that a private plaintiff's "claim need only be 'tested under the Sherman Act's general restraints of trade,' and meet the requirement that petitioner has thereby suffered injury."[32] In correspondingly strong language, the Supreme Court has directed that summary judgment is generally inappropriate in complex antitrust cases where motive and intent play leading roles.[33] Standing to sue issues in federal antitrust litigation most frequently arise in the context of a motion to dismiss for failure to state a claim upon which relief can be granted.[34]

> Although "[t]rial by affidavit is no substitute for trial by jury," it is to be preferred to no trial at all which is the result of dismissal of an action on standing grounds because the alleged injury is not sufficiently direct.[35]

Nevertheless, the Court has acknowledged that

> [t]he lower federal courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy

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[30] 15 U.S.C. §§ 1-7 (1970).

[31] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948); *see* FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968).

[32] Radovich v. National Football League, 352 U.S. 445, 453 (1957)(citation omitted); *e.g.*, Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656, 660 (1961); Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251, 265-66 (1946).

[33] Summary judgments, under FED. R. CIV. P. 56, have utility in antitrust litigation as elsewhere. White Motor Co. v. United States, 372 U.S. 253, 259-63 (1963); *see* First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253 (1968). Paralleling its unrestrictive stance concerning the standing requirements under section 4 of the Clayton Act, the Supreme Court has recognized, however, that the courts should be extremely hesitant before granting a motion for summary judgment depriving an antitrust plaintiff of a trial. Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962); *see, e.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656 (1961).

[34] FED. R. CIV. P. 12 (b)(6).

[35] Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1150 (6th Cir. 1975), *citing* Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962)(footnote omitted).

> in damages for all injuries that might conceivably be traced to an antitrust violation.[36]

Despite the Supreme Court's admonitions that there should be no judicially imposed limitations on the class of private litigants having standing to sue under the antitrust laws, the lower federal courts have restricted the availability of the treble-damages remedy beyond the express terms of section 4 of the Clayton Act. Realizing the potentially infinite chain of injury which could evolve from a single antitrust violation, the courts have surmised that to allow treble damages to anyone injured by reason of an antitrust violation "would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress."[37] Similarly, the courts have contended that a liberal interpretation of section 4 would subject unsuspecting businesses to "liability of indefinable scope" without preventing the possibility that more than one plaintiff might recover treble damages for the same injury.[38]

The courts which have adopted a restrictive approach to the requirements for standing to seek judicial relief under the antitrust laws, based upon the directness of the causal connection between the asserted violation and the injury suffered, have ignored the principle function of the doctrine—to prevent the maintenance of suits by plaintiffs who are jurisdictionally barred by article III. It is clear that a party may make sufficient factual allegations to surmount the threshold standing requirement and then fail to prevail on the merits of the case.[39] Essentially, the entire question of directness may only be resolved upon a factual showing approaching a trial on the merits, while standing should remain a preliminary determination to be resolved on the basis of the allegations in the complaint.[40] Nevertheless, two disparate analytical

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[36] Hawaii v. Standard Oil Co., 405 U.S. 251, 262 n.14 (1972).

[37] Calderone Enterprises Corp. v. United Artists Threatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972).

[38] Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956); *see* Ames v. American Tel. & Tel. Co., 166 F. 820, 823 (D. Mass. 1909).

[39] Although the plaintiff may fail to establish the illegality of the defendant's conduct on the merits, until that time, he should be given the benefit of exploiting "any available remedy to make good the wrong done." J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964), *quoting* Bell v. Hood, 327 U.S. 678, 684 (1946).

[40] The principle that standing determinations do not turn on the merits of the controversy has been articulated by the Court on numerous occasions. *See, e.g.,* Warth v. Seldin, 422 U.S. 490, 500 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225 n.15 (1974); Flast v. Cohen, 392 U.S. 83, 99-100 (1968). *But see* Warth v. Seldin, *supra,* at 520 (Brennan, J., dissenting). Its validity has been debated among the commentators. *Compare, e.g.,* A. BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (1962), *and* Jaffe, *Stand-*

techniques have been employed by the lower federal courts to impose limitations on the class of private litigants having standing to sue under the antitrust laws: the "direct injury" and "target area" approaches.

B. The Direct Injury Approach

In the early cases involving section 4 and its predecessor in the Sherman Act,[41] the courts initiated restrictive judicial construction of the statutory standing provision to limit a private litigant's access to the treble-damage remedy for violations of the antitrust laws. Specifically, the courts focused upon the causal connection between the plaintiff's alleged injury and the asserted unlawful activities of the antitrust violator. In *Loeb v. Eastman Kodak Co.*,[42] a stockholder and creditor of a corporation in the photographic supply business, which had allegedly been forced into bankruptcy by certain activities of its competitor, Eastman Kodak, brought suit alleging that as a result of the defendant's antitrust violations, the plaintiff had suffered a diminution in the value of his stockholdings.[43] The decision of the district court, subsequently affirmed by the United States Court of Appeals for the Third Circuit, denied the plaintiff standing to sue under section 4's predecessor. The court reasoned that the bankrupt corporation was the only potential litigant "directly injured" by the asserted antitrust violation and, therefore, the only proper party to maintain the suit for treble damages. According to the court, any injury received by the plaintiff in his capacity as shareholder and creditor was "indirect, remote, and consequential," since the effects of the antitrust violation were directed at the

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ing Again, 84 HARV. L. REV. 633 (1971), *with, e.g.*, Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1971); Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964), *and* Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972).

Indeed, strict adherence to the procedure for ruling on a motion to dismiss for lack of standing would preclude consideration of the merits by the trial and reviewing courts since the material allegations of the complaint must be taken as admitted and all pleadings must be construed in favor of the complainant. *E.g.*, Warth v. Seldin, 422 U.S. 490, 501 (1975); Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969). As long as the complaint presents "something more than an ingenious academic exercise in the conceivable," the standing inquiry is properly limited to the factual allegations in the complaint. *See* United States v. SCRAP, 412 U.S. 669, 688 (1973).

[41] Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), superseded Section 7 of the Sherman Act, Act of July 2, 1890, ch. 647, 26 Stat. 209 (repealed 1955).

[42] 183 F. 704 (3d Cir. 1910).

[43] The plaintiff alleged that Eastman Kodak entered into various contracts and combinations in restraint of interstate trade and was thereby monopolizing commerce in the photographic industry. *Id.* at 706.

ruined corporation.[44] Representing the genesis of the direct injury approach, the *Loeb* decision has been interpreted to condition standing under section 4 of the Clayton Act upon the plaintiff's being directly injured by the acts of the antitrust violator.[45]

Inquiry under the direct injury test focuses upon the relation between the alleged antitrust violator and the private claimant:[46] If the necessary causal connection between the violation and the commercial losses exists, the plaintiff's injury will be deemed the direct result of the defendant's unlawful activities, and standing to seek judicial relief under section 4 will be accorded.[47] The direct injury test's operative characteristics may be restated as follows: The plaintiff suing under section 4 must be a person against whom the antitrust combination or conspiracy is directed, or one who has had direct business dealings with the violator.[48]

The apparent simplicity of the direct injury approach tends to build predictability into standing determinations under section 4. Although the causal distinctions between direct injury and mere "indirect, remote, and consequential" bereavement are indeed subtle, guidelines for potential antitrust plaintiffs arise by descriptive inference from the cases. The courts applying the direct injury test have concluded that standing will not obtain for plaintiffs embraced within the following categories: (1) shareholders (suing in their own behalf as opposed to

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[44] *Id.* at 709 (emphasis added). The court concluded:

> There must exist some barrier which will effectually prevent such a multiplicity of suits as the plaintiff's position suggests, and we believe not only that that barrier exists, but that it is found now just where it was prior to the passage of the act in question.

[45] *See, e.g.*, Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292, 295 (2d Cir. 1958).

[46] *See In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973); Beane, *supra* note 6, at 333.

[47] *See* SCM Corp. v. Radio Corp. of America, 407 F.2d 166, 171 (2d Cir.), *cert. denied,* 395 U.S. 943 (1969), where the court concluded:

> Standing to sue was not given by Congress to any and every citizen who, motivated by public spirit or possibly some baser reason, would set himself up as a watchdog of business behavior. Congress properly bestowed the right to sue only on such persons as might be [directly] injured in their business or property *by reason of* anything forbidden in the anti-trust laws.

A party does not acquire the right simply because he sustained losses by virtue of "an interruption or diminution of profitable relationships with the party directly affected by alleged violations of the anti-trust laws." Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956).

[48] *See, e.g.*, Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269 (2d Cir. 1975), *cert. denied,* 96 S. Ct. 855 (1976) (direct injury test applied despite target area language); Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289, 307 (D. Colo. 1969), and cases cited therein.

derivatively),[49] officers,[50] creditors,[51] and employees[52] of an injured corporation; (2) suppliers;[53] (3) lessors;[54] (4) franchisors;[55] (5) licensors;[56] (6) patentees;[57] and (7) ultimate consumers.[58] In each judicially defined category, the private claimant was insulated from the direct impact of the antitrust violation by an intermediate antitrust victim which, according to the courts, was the sole party possessing the requisite standing to sue under section 4. The presence of the intervening party, usually dealing directly with the antitrust violator, rendered the plaintiff's injury indirect and not judicially cognizable. Although each plaintiff admittedly suffered resultant economic injury, the tenuous relation between the claimant and the alleged violator or affected market would not support the recovery of treble damages; therefore, no damages at all were allowed.[59]

The conclusory categories provide suitable benchmarks for plain-

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[49] *E.g.*, Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292 (2d Cir. 1958); Martens v. Barrett, 245 F.2d 844 (5th Cir. 1957).

[50] *E.g.*, Westmoreland Asbestos Co. v. Johns-Manville Corp., 113 F.2d 114 (2d Cir. 1940), *aff'g per curiam* 30 F. Supp. 389, 391 (S.D.N.Y. 1939); Sargent v. National Broadcasting Co., 136 F. Supp. 560 (N.D. Cal. 1955).

[51] *E.g.*, Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910); *cf.* Miley v. John Hancock Mut. Life Ins. Co., 242 F.2d 758 (1st Cir.), *aff'g per curiam* 148 F. Supp. 299 (D. Mass.), *cert. denied*, 355 U.S. 828 (1957).

[52] *E.g.*, Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Deaktor v. Fox Grocery Co., 332 F. Supp. 536 (W.D. Pa. 1971), *aff'd*, 475 F.2d 1112 (3d Cir. 1973); Centanni v. T. Smith & Sons, Inc., 216 F. Supp. 330 (E.D. La.), *aff'd*, 323 F.2d 363 (5th Cir. 1963).

[53] *E.g.*, Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 272 U.S. 907 (1963); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956).

[54] *E.g.*, Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956). *Contra*, Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957).

[55] *E.g.*, Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos., 382 F.2d 925 (10th Cir. 1967). *See generally* Comment, *The Franchisor as Plaintiff in Treble Damage Actions: An Antitrust Anomaly*, 49 B.U.L. Rev. 322 (1969).

[56] *E.g.*, SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969).

[57] *E.g.*, Productive Inventions, Inc. v. Trico Prods. Corp., 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

[58] *E.g.*, United Egg Producers v. Bauer Int. Corp., 312 F. Supp. 319 (S.D.N.Y. 1970). *See generally* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

[59] The application of the direct injury test has resurrected common law notions of privity. Essentially, if the treble damages plaintiff is separated from the antitrust violator by an intermediary, standing will be denied simply by labeling the injury as indirect, remote, or consequential. *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

tiffs contemplating section 4 actions. The price private litigants have had to pay for predictability, in direct injury jurisdictions, however, has been the peremptory denial of standing to all but injured competitors of the antitrust violator. Moreover, the direct injury approach reverts standing determinations from an analysis of the allegations in the complaint to a perfunctory search for labels. Indeed, the direct injury test summarily ignores the calculus underlying section 4 standing: whether the plaintiff is within the congressionally delineated class intended to acquire a private right of action based upon the alleged antitrust violation and the nature of the resultant competitive harm.[60] In sum, the inequities in denying standing to private plaintiffs who happen to fall within the certain "talismanic rubrics," have perhaps prompted the Supreme Court, by implication, to withdraw any imprimatur from the direct injury test.[61] The Court in *Perkins v. Standard Oil Co.*,[62] concluded that the direct-indirect limitation on standing is completely artificial and unwarranted by the Act.[63] The Court noted that "the competitive harm done . . . is certainly no less because of the presence of an additional link in this particular distribution chain from the producer to the retailer."[64]

C. *The Target Area Approach*

It should be apparent that the direct injury approach is not flexible enough to confer standing properly on all persons entitled to the recovery of treble damages within the congressional dictates of section 4 of the Clayton Act. Accordingly, at the cost of reduced predictability, the

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[60] *See* Beane, *supra* note 6, at 335.

[61] *See In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 128-29 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

[62] 395 U.S. 642 (1969), *rev'g* 396 F.2d 809 (9th Cir. 1968). Although the *Perkins* decision involved Clayton Act § 2, 15 U.S.C. § 13 (1970), its analogous application to standing under section 4 is convincing.

[63] 395 U.S. at 647.

[64] *Id.* at 648. It is important to recognize, however, that the Supreme Court has engaged in categorization in citizen standing cases. Most notably, the Court has established rigorous requirements which must be satisfied before standing is conferred upon a taxpayer. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); Flast v. Cohen, 392 U.S. 83 (1968). The Chief Justice has remarked that a plaintiff never has standing unless he can establish that "'he *has sustained or is immediately in danger of sustaining a direct injury . . .*'" United States v. Richardson, *supra* at 177-78, *quoting Ex parte* Levitt, 302 U.S. 633, 634 (1937). *See also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), where the Court held that only purchasers and sellers of securities have standing to bring the private action for damages which the federal courts have implied from the Securities and Exchange Commission's (SEC) rule 10b-5, 17 C.F.R. § 240.10b-5 (1975).

majority of jurisdictions have adopted a more elastic functional analysis to determine standing to sue under section 4: The target area approach.[65] Under the target area test, a plaintiff who asserts commercial injuries occasioned "by reason of" the defendant's illegal conduct must show that the claimed losses fall within the sector of the economy in which the alleged antitrust violation threatens a breakdown of competitive conditions before standing will be granted.[66] Thus, the target area test imports a two-step analysis. The endangered area of the economy must first be identified, and then the claimant's injury must be found to have been incurred within the affected economic location.[67] The operational characteristics of the test may be restated as follows: If the private plaintiff falls within the designated economic area, and if the economic conditions in that sector were deleteriously affected by the alleged antitrust violation, standing to seek the treble damages recovery is granted. In contrast to the direct injury approach, the target area test shifts the focus of the standing inquiry from the plaintiff's relation with the alleged antitrust violator to his connection with the injured market.

Conference of Studio Unions v. Loew's Inc.[68] represents one of the first attempts to employ the target area concept in standing determinations under section 4 of the Clayton Act. The plaintiffs in that case alleged that an antitrust violation was consummated by the defendant motion picture companies' agreement with a labor union to employ only members of that union, in return for the union's promise to furnish lesser skilled union members to other independent motion picture producers at higher rates, thus destroying the independents' ability to compete. The United States Court of Appeals for the Ninth Circuit held that the plaintiffs failed to state a cause of action under the antitrust laws and denied them standing to assert their claim for treble damages. The court concluded by defining the target area test:

> [I]n order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed that harms him. He must show that he is *within* the area of the economy which is endangered by a breakdown of competitive conditions in a particular

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[65] *See* note 6 *supra;* Beane, *supra* note 6, for a description of the standing tests applied by the respective circuits.

[66] *E.g.,* Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970), *cert. denied,* 402 U.S. 923 (1971); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952).

[67] *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973).

[68] 193 F.2d 51 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952).

> industry. Otherwise he is not injured "by reason" of anything forbidden in the anti-trust laws.[69]

The court's statement indicates that standing will be attained if the treble damages plaintiff is situated within the impact area and alleges injury to an interest protected by the antitrust laws. The court, however, failed to establish guidelines for the judicial resolution of whether a particular plaintiff "is within the area of the economy which is endangered by a breakdown of competitive conditions." The two circuits employing the target area analysis differ substantially regarding this question.

In decisions subsequent to *Studio Unions,* the Ninth Circuit has concluded that the boundaries of the target area are determined by the foreseeability of injury derived from the antitrust violation.[70] The target area is defined as the sector of the economy " 'which it could reasonably be foreseen would be affected' by the anti-trust violation."[71] Generally, if a reasonable person could foresee, from the nature of the defendant's purported antitrust violation, that a particular area of the economy would be adversely affected, then *any* person competing within the delineated area will have standing to maintain an action under section 4 for the resultant injuries to his business or property.

For example, in *Mulvey v. Samuel Goldwyn Productions,*[72] the plaintiff alleged that the "block booking" practice of the defendant motion picture distributor occasioned a diminution in the value of his income rights under a distribution contract in violation of the antitrust laws. Although the defendant's activities were directed "at the means of distributing films," the plaintiff was afforded standing since his status as an owner of a motion picture "was within the area 'which it could reasonably be foreseen would be affected' " by the block booking policy.[73]

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[69] *Id.* at 54-55 (emphasis added).

[70] *See, e.g.,* Contreras v. Grower Shipper Vegetable Ass'n, 484 F.2d 1346 (9th Cir. 1973), *cert. denied,* 415 U.S. 932 (1974); Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970), *cert. denied,* 402 U.S. 923 (1971); Hoopes v. Union Oil Co., 374 F.2d 480 (9th Cir. 1967); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964).

In Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955), the court generally concluded:

> In a private anti-trust suit, the plaintiff must not only allege a violation of the anti-trust laws, but damage to the plaintiff proximately resulting from the acts and conduct which constitute the violation.

[71] Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967), *citing* Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964).

[72] 433 F.2d 1073 (9th Cir. 1970), *cert. denied,* 402 U.S. 923 (1971).

[73] *Id.* at 1076.

By incorporating foreseeability into the test used to determine standing under section 4, the Ninth Circuit expanded the class of potential antitrust plaintiffs. A plaintiff within the target area is considered to be injured by reason of his position and, thus, the proof of the causal connection is simpler. In contrast to the direct injury test, considerations of privity and the existence of intermediate parties are irrelevant to standing determinations under the target area approach. If the treble-damages plaintiff is embraced within the target area because of his relation with the affected market, standing under section 4 will not be denied simply because he was not the initial victim of the asserted antitrust violation.[74]

Although the Second Circuit purports to adhere to the target area test, it has consistently refused to follow the "reasonably foreseeable" standard to determine whether the plaintiff has a sufficient nexus with the antitrust violation to entitle pursuit of the treble damages remedy.[75] Accordingly, under the Second Circuit formulation

> even parties whose injuries may be both immediate and foreseeable may lack standing to pursue a private remedy if that injury is indirect or incidental, or if their business was not in the target area of the allegedly illegal acts.[76]

It follows that only direct victims of the proscribed antitrust contract, combination, or conspiracy are considered to be within the target area for section 4 standing.[77] To have standing, the private plaintiff must have been "aimed at" by the violator, and the claimant is "aimed at" only if the unlawful conduct was directed at the area of the economy in which he is doing business.[78] Thus, in *Field Productions, Inc. v. United Artists Corp.*,[79] a factual milieu indistinguishable from *Mulvey*, the

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[74] Hoopes v. Union Oil Co., 374 F.2d 480, 486 (9th Cir. 1967).

[75] *See, e.g.*, Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co., 497 F.2d 1151 (2d Cir.), *cert. denied*, 419 U.S. 968 (1974); GAF Corp. v. Circle Floor Co., 463 F.2d 752 (2d Cir. 1972), *cert. denied*, 413 U.S. 901 (1973); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969).

[76] Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269, 1274 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 855 (1976).

[77] It has been argued that this standard is virtually identical to the direct injury approach. Higginbotham, *Some Judicial Adjustments to the Rights of Recovery Under the Federal Antitrust Laws*, 26 ALA. L. REV. 309, 317-18 (1974).

[78] *See* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187-88 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

[79] 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971).

plaintiff who had also suffered a decrease in income resulting from the defendant's block-booking distribution of his film was denied standing. Since the other distributors were the object of the defendant's allegedly unlawful practices, the plaintiff was outside the target area since he was not "aimed at."

The target area approach to standing under section 4 of the Clayton Act clearly expands the class of potential plaintiffs beyond competitors of the antitrust violator. In this respect it is to be preferred over its direct injury counterpart since one of the paramount policies underlying the treble damages recovery is to ensure that the "private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the anti-trust laws."[80] The policy of promoting private enforcement of the antitrust laws, however, must be counterbalanced by the equally important concern of excluding remote parties with possibly speculative injuries in order to arrive at the proper prudential limitations on standing to pursue treble damages under section 4. Since the target area test focuses upon causation and the nature of the competitive injury incurred by the plaintiff, it is an improvement over the direct injury test's myopic concern with what is essentially privity.

Nevertheless, it is submitted that the target area standing analysis, under either formulation, inappropriately requires more than a threshold determination of whether the plaintiff's complaint alleges a justiciable case or controversy within the congressional policy limitations for the exercise of section 4's treble-damages remedy. The "reasonably foreseeable" formula requires a factual resolution of causation, while the "aimed at" standard involves a determination of the violator's motive or intent. In sum,

> [t]hese tests, although seeming to have the virtue of simplicity, fail to meet the real issue: the statutory purpose. To ask whether the plaintiff was "directly injured" is to ask the wrong question; what the court should ask is whether the plaintiff (1) is, himself, within the class of persons entitled to protection and (2) alleges an injury of a type the statute was intended to guard against.[81]

A section 4 standing analysis comprising the two-part determination of whether the particular plaintiff is an intended beneficiary of the statutory provision and whether he suffered competitive harm, could be employed without inquiry beyond the allegations in the complaint. The fact that the claimant's injury may have resulted indirectly does not alone preclude standing,

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[80] Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

[81] Note, *supra* note 29, at 587.

> [b]ut it may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.[82]

IV. The Twilight Zone Of *Malamud v. Sinclair Oil Corp.*

In *Malamud v. Sinclair Oil Corp.*,[83] plaintiffs representing a petroleum distributing business and related real estate investment companies[84] instituted a private treble damages action against Sinclair Oil,[85] their supplier under a distributorship agreement. The plaintiffs contended that the defendants, seeking to maintain the status quo in the market area served by the distributorship, withheld promised financial assistance to the investment companies for contemplated expansion efforts, and subsequently refused an early termination of the distribution contract in violation of the antitrust laws.[86] As a result, the plaintiffs asserted damages in the form of lost profits, since the defendants' failure to provide financing effectively foreclosed planned expansion in the form of the development of additional service station sites.[87]

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[82] Warth v. Seldin, 422 U.S. 490, 505 (1975).

[83] 521 F.2d 1142 (6th Cir. 1975).

[84] The original proceeding in the trial court involved three classes of plaintiffs: (1) the officers, directors, and sole shareholders of the petroleum distributing company; (2) the distributing company in its corporate capacity; and (3) three real estate investment companies. Relying upon Volasco Prod. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963), the trial court ruled that the individual plaintiffs and the distributing company could not, as a matter of law, establish the necessary causal connection between their injury (lost profits stemming from unrealized growth) and the alleged antitrust violation. 521 F.2d at 1145. Unfortunately, therefore, the issue of their respective standing was not before the Sixth Circuit, since the district judge, pursuant to 28 U.S.C. § 1292(b) (1970), only certified the question of the investment companies' standing.

[85] The requisite plurality of actors was satisfied since the original complaint joined Sinclair Refining Company and its parent, Sinclair Oil Corporation. The defendants have since been merged with Atlantic Richfield Company. 521 F.2d at 1143. On the issue of intracorporate conspiracy under the antitrust laws, see Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968).

[86] The plaintiffs asserted that Sinclair's refusal to grant an early termination of the distribution agreement and its failure to provide financing for expansion violated both section 1 of the Sherman Act, 15 U.S.C. § 1 (1970), and section 3 of the Clayton Act, 15 U.S.C. § 14 (1970). 521 F.2d at 1144-45.

[87] It is clear that the claimants sufficiently alleged the two prerequisites to standing under the language of section 4 of the Clayton Act: (1) an injury to the plaintiffs' "business or property," that was (2) occasioned "by reason of" the defendants' alleged antitrust violations. The elements of a prima facie case leading toward the recovery of treble damages under section 4 have been enumerated as follows: The plaintiff must establish a violation of the antitrust laws, an injury to his commercial ventures or enterprises result-

The decision of the district court, subsequently affirmed by the United States Court of Appeals for the Sixth Circuit, granted the investment companies standing to maintain the cause of action. Rejecting both the direct injury and target area approaches, the court concluded that the appropriate test for determining standing under section 4 was defined by the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp,*[88] where the Court developed a bifurcated test: (1) The plaintiff must allege injury in fact and (2) seek protection for a judicially cognizable interest which is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[89] Adopting the *Data Processing* analysis, the Sixth Circuit examined the direct injury and target area tests and concluded that they both require too much from private plaintiffs at the pleading stage of the case. The court further reasoned:

> The courts have used one or the other of the two approaches as standing doctrines in order to arrest some antitrust litigation at an early stage. As we see it, however, by using either approach a court is enabled to make a determination on the *merits* of a *claim* under the guise of assessing the *standing* of the *claimant.* Under either theory the entire question of directness is one that must be resolved upon some factual showing, but standing is a preliminary determination ordinarily to be evaluated upon the allegations of the complaint.[90]

Data Processing concerned judicial review under the Administrative Procedure Act[91] of administrative action alleged to have caused the plaintiffs' competitive harm. The plaintiffs, sellers of computer services, challenged a ruling of the Comptroller of the Currency which had allowed national banks, as an incident to their banking services, to provide data processing services to other banks and customers. Plaintiffs, relying on section 4 of the Bank Services Corporation Act of 1962,[92] which provides that no bank service corporation may engage in any activity other than the performance of bank services for banks, alleged that competitive economic injury resulted from the Comptroller's ruling. Applying the newly formulated standing test, the Court concluded that the plaintiffs had standing since both of the symbiotic require-

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ing from the defendants' putatively wrongful actions, and some indication of the amount of damage incurred. *See, e.g.,* Terrell v. Household Goods Carriers Bureau, 494 F.2d 16, 20 (5th Cir.), *cert. dismissed,* 419 U.S. 987 (1974).

[88] 397 U.S. 150 (1970).

[89] *Id.* at 152-53.

[90] 521 F.2d at 1149-50. For similar reasoning, see text accompanying note 81 *supra.*

[91] 5 U.S.C. §§ 551-59, 701-06 (1970).

[92] 12 U.S.C. § 1864 (1970).

ments were satisfied. The Court decided that the first prong of the test, injury in fact, was met since not only did the plaintiffs allege a loss of future profits due to the added competition of the banks, but also one named defendant bank was preparing to perform data processing services for two of the plaintiffs' customers. The Court found further that section 4 of the Bank Services Corporation Act arguably brought the plaintiff's interest in freedom from unlawful competition within its protected zone; thus, the second prong of the test was satisfied.

Similarly, the *Malamud* court, applying the *Data Processing* test, concluded that the investment companies had standing under section 4 of the Clayton Act. The plaintiffs claimed injury in fact derived from the failure of Sinclair to provide financing. According to the court, the putatively unlawful activities of the defendants effectively foreclosed the plaintiffs' planned expansion and gave rise to lost profits which constitute economic injury in fact.[93] Secondly, since the antitrust laws were enacted to preserve unfettered competition by outlawing combinations and conspiracies in restraint of trade, the court decided that the plaintiffs' interests in freedom from the effects of anticompetitive behavior were arguably within the protective zone of section 4 of the Clayton Act.

The automatic application of the *Data Processing* criteria to determine standing under section 4 of the Clayton Act may be questionable, especially since the Supreme Court has presumptively limited the test's utility to suits under the Administrative Procedure Act (APA).[94] Nevertheless, the *Malamud* court drew convincing parallels between challenges to administrative action by a person "adversely affected or aggrieved by agency action,"[95] and private treble damages litigation under section 4. The court reasoned:

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[93] Economic injury is clearly a legally cognizable injury for purposes of standing to seek judicial review. *See* Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

[94] *E.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 n.16 (1974). Particularly, the application of *Data Processing* to cases involving private challenges to nongovernmental action has been questioned. Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151 (6th Cir. 1975) and cases cited therein. *See generally* Hasl, *Standing Revisited—The Aftermath of Data Processing,* 18 ST. LOUIS U.L.J. 12 (1973).

Arguably, the standing issue in purely private litigation is preempted by real party in interest considerations under FED. R. CIV. P. 17(a); *see* 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 10, § 3531.

[95] 5 U.S.C. § 702 (1970). This section of the APA provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

> Because a private action under Section 4 has some considerable enforcement value, it is in the nature of a public suit. As with a suit in the administrative law field, a private antitrust claim seeks both to remedy the alleged injury to the private plaintiff and to "vindicate the important public interest in free competition."[96]

Finally, to justify its application of the *Data Processing* analysis, the court found that section 4's broad standing requirements are analogous to the standards contained in APA section 702 which similarly establishes a private right to judicial review for injurious administrative action.[97]

Restrictive standing approaches violate the integrity of the doctrine as a threshold determinant for the propriety of judicial intervention. Nevertheless, the judicial necessity of denying the forum to remote parties exists as an adjunct to the current trend limiting federal jurisdiction.[98] The *Malamud* decision adopts a measured approach to this dilemma, as it concerns standing determinations under section 4 of the Clayton Act. Additionally, the case establishes a standing analysis which is consistent with the Supreme Court's two-dimensional view.[99] The first prong of the *Data Processing* test, injury in fact, comports with the case or controversy requirement of article III, while the zone of interests inquiry represents a prudential limitation on the standing doctrine.[100] Accordingly, the plaintiff asserting speculative injury derived from the ripple effects of a distant antitrust violation can be easily rejected under either part of the test without reliance upon privity or an amorphous target area.

The *Malamud* analysis also establishes predictability for potential treble damages plaintiffs. The antitrust laws evince congressional concern for interests in "preserving free and unfettered competition as the rule of trade."[101] Therefore, if the plaintiff alleges injury derived from the type of anticompetitive conduct which Congress legislated against in the antitrust laws, standing will be granted since the asserted interest is clearly within the zone of interests protected or regulated by the statute in question. The private plaintiff who claims injury to his com-

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[96] Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151 (6th Cir. 1975), *quoting* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969).

[97] 521 F.2d at 1151; see note 95 *supra.*

[98] *See* Warth v. Seldin, 422 U.S. 490, 519 (1975) (Douglas, J., dissenting).

[99] See text accompanying notes 8 through 24 *supra.*

[100] *See* United States v. Richardson, 418 U.S. 166, 196 n.18 (1974)(Powell, J., concurring).

[101] Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958); *e.g.*, Charles A. Ramsay Co. v. Associated Billposters, 260 U.S. 501, 512 (1923).

petitive position occasioned by a purported violation of the antitrust laws fulfills a claimant's responsibility "to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."[102] Indeed, it may be argued that when a private action is initiated under the antitrust laws, the requisite injury to sustain standing may be less direct and palpable than the variety required in constitutional challenges since Congress, in enacting section 4, intended citizen access to the treble damages recovery as a deterrent to anticompetitive behavior.

Conclusion

With the independent development of the two views on standing under section 4 of the Clayton Act, it should not be surprising to discover that the federal courts have reached opposite conclusions in similar, if not identical, factual situations.[103] More importantly, however, under either approach a court is enabled to make a determination on the merits of a claim under the guise of assessing the standing of the claimant.

The language of section 4 is sweeping in tone, accurately reflecting the congressional intent in providing an effective private remedy for antitrust violations.[104] There are three paramount purposes underlying section 4: (1) to aid in the enforcement of the antitrust laws, (2) to deter potential violators from actually participating in the proscribed activities, and (3) to provide an adequate remedy for the injured victim. As many commentators have indicated, a broad interpretation of the standing requirements under section 4 is necessary in order to effectuate the purposes underlying the statutory provision.[105] Enforcement of the antitrust laws is greatly promoted if *all* parties, establishing injury to protected interests as a result of an antitrust violation, are encouraged to bring suit rather than be thwarted by restrictive standing tests. Similarly, the goal of deterrence will best be achieved if the injured parties are not barred from recovery.

One result of the employment of a restrictive standing test by the

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[102] Warth v. Seldin, 422 U.S. 490, 518 (1975).

[103] See note 7 *supra*.

[104] The congressional debates surrounding the enactment of the predecessor of Clayton Act § 4, Sherman Act § 7, Act of July 2, 1890, ch. 647, 26 Stat. 209 (repealed 1955), indicate that a primary purpose in allowing a private antitrust suit is to encourage enforcement of the antitrust laws. 21 Cong. Rec. 1767, 2615, 3146, 3150 (1890).

[105] *See* Alioto & Donnici, *Standing Requirements for Antitrust Plaintiffs in Judicially Created Exceptions to a Clear Statutory Policy*, 4 U. San Fran. L. Rev. 205 (1970); Higginbotham, *supra* note 77; Note, *supra* note 29.

lower federal courts is, in some circumstances, to encourage a party to violate the antitrust laws with impunity. If a potential violator is confident that he will not be liable for treble damages because of a restrictive standing requirement, he may well feel that the risk of government prosecution alone is not substantial enough to render his anticompetitive habits unwise. Finally, potential treble-damages liability is the best assurance that an injured party will be adequately recompensed for commercial losses which might otherwise be difficult to establish in their totality. One writer, after defining these three separate goals, made the following statement as to the overall thrust of section 4: "Its purpose is so broad and its mandate so clear that any person who can show damage prima facie should be within the protected class."[106] Indeed, all that section 4 itself requires is that a potential plaintiff allege injury to his "business or property" caused by the asserted antitrust violation. There is no indication in the Act itself, or in the legislative history surrounding it, that Congress wished the courts to employ any restrictions beyond the express language of the statute in rendering decisions on plaintiffs' standing to sue under section 4 of the Clayton Act.

If section 4 is to accomplish its original purposes, the courts must be flexible in their evaluation of plaintiffs' allegations in regard to causation. The Supreme Court has spoken to the need for an unrestrictive approach in several cases. In *Radovich v. National Football League,*[107] the Court was called upon to decide whether the complaint was sufficient to state a cause of action under sections 1 and 2 of the Sherman Act.[108] In concluding that the necessary cause of action was expressed in the pleadings, the Court, recognizing the policy of encouraging private litigants to aid in the enforcement of the antitrust laws, reasoned:

> In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.[109]

Subsequently, in *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.,*[110] the Court once again emphasized its preference for a broad interpretation of section 4. The Court unambiguously concluded that an unrestrictive approach is dictated by the language of the statute:

> [T]o state a claim upon which relief can be granted under [section 1 of the Sherman Act], allegations adequate to show a violation and, in

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[106] Note, *supra* note 29, at 587.
[107] 352 U.S. 445 (1957).
[108] 15 U.S.C. §§ 1, 2 (1970).
[109] 352 U.S. at 454.
[110] 364 U.S. 656 (1961).

> a private treble damage action, that plaintiff was damaged thereby are all the law requires.[111]

It is clear, therefore, that when evaluated in light of the language of the Clayton Act itself, the purposes underlying the Act, and the Supreme Court's interpretations, limiting standing tests under section 4 are inappropriate.

William Norman Krucks

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[111] *Id.* at 660.

STRICT LIABILITY AND ALLERGIC DRUG REACTIONS

The duty of the manufacturer or seller of a product to persons who are allergic to,[1] or are unusually susceptible to injury from, the product is one of the most intriguing and most complex subjects which arises in the field of products liability. Intrigue and complexity arise due to the use of generalized terms such as "reasonable man" and "ordinary care" which do not lend themselves to precise application.

The focal point in dealing with the allergic drug consumer is the element of proximate causation. In general the problem arises when a person who is allergic or unusually susceptible to injury from a product and who has suffered injury from the use of the product sues the seller or manufacturer for compensation for damages sustained; the usual defense being that the cause of the injury is the allergy or unusual susceptibility and not a defect in the drug.

Nearly every product intended for intimate bodily use, such as drugs, foods, and cosmetics, will inevitably produce an adverse effect upon a certain percent of the population.[2] Allergenic reactions to drugs can be entirely unpredictable and can range from the mild and reversible to the severe and irreversible. When these unanticipated injuries are compared with the many beneficial effects of drugs, a dilemma arises for the courts, which frequently strive to compensate unknowing allergy victims by spreading the burden of the injury among the consumers of the drug, holding the drug manufacturer liable notwithstanding the exercise of due care in production. In the vast majority of cases the beneficial effects of drugs greatly outweigh the catastrophic ones; therefore, the policy considerations which call for strict liability in the case of defectively manufactured products are not necessarily present where a drug is not defectively produced but nevertheless causes injurious, allergenic reactions in a part of the population. This comment discusses whether strict liability should be imposed upon a manufacturer for injury caused by its drug, not because the drug was physically defective, but because of an allergenic condition in the makeup of the injured person not present in everyone. The importance of this area of the law cannot be overemphasized, for the public is becoming drug-reaction conscious, and it is becoming increasingly clear that society will continue to support new drug development only to the extent that the law

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[1] The words "allergenic or unusually susceptible" pertain to injuries suffered by a person because of some unusual characteristic, not common to the population as a whole, which makes the person peculiarly susceptible to an adverse reaction when exposed to the product.

[2] Whitmore, *Allergies and Other Reactions Due to Drugs and Cosmetics*, 19 Sw. L.J. 76 (1965).

provides appropriate and adequate remedies for consumers injured or killed by drug reaction.

I. Liability for Allergic Reactions

Allergic or idiosyncratic individuals are those persons more susceptible to harm from a given product than most others;[3] they react adversely and in unforeseen ways.[4] No recovery is generally allowed in these instances on the theory that the manufacturer is unable to predict what will happen to a hypersensitive consumer and that the benefit of the general public in the use of the product outweighs the harm suffered by a few.[5] Usually courts have held the manufacturers not liable where the consumer's reactions exist in an insignificant percentage of the population.[6] These decisions are grounded on the rationale that if the product is not harmful to a significant number, then it is reasonably fit for the purpose for which it is sold. Proximate cause of the injury is attributed to the existence of the idiosyncrasy or allergy in the injured party and not to a defect in the product.[7]

On the other hand, when a significant number of consumers are susceptible, the manufacturer has been held liable on the theory that the manufacturer should have known and recognized the danger of its product and warned the consuming public of this defect.[8] The manufacturer need not have actual knowledge of the defect prior to the injury; constructive knowledge of the defect is implied if the defect is one of which the manufacturer could reasonably have known.[9]

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[3] Lewis v. Casenburg, 157 Tenn. 187, 7 S.W.2d 808 (1928).

[4] Schattman, *A Cause of Action for the Allergic Consumer*, 8 Houston L. Rev. 827, 829-33 (1971).

[5] Bonowski v. Revlon, Inc., 251 Iowa 141, 100 N.W.2d 5 (1959); Thomas v. Gillette Co., 230 So. 2d 870 (La. Ct. App. 1970); Kaempfe v. Lehn & Fink Prod. Corp., 21 App. Div. 2d 197, 249 N.Y.S.2d 840 (Sup. Ct. 1964).

[6] Magee v. Wyeth Lab., Inc., 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (2d Dist. Ct. App. 1963); Casagrande v. F.W. Woolworth Co., 340 Mass. 552, 165 N.E.2d 109 (1960). The courts have varied in determining what is an insignificant percentage of the population. Merrill v. Beaute Vues Corp., 235 F.2d 893 (10th Cir. 1956) (500,000,000 products sold with "only rare" side effects); Bonowski v. Revlon, Inc., 251 Iowa 141, 100 N.W.2d 5 (1959) (1 in 5 million); Casagrande v. F.W. Woolworth Co., *supra* (1 in 2,000); Walstrom Optical Co. v. Miller, 59 S.W.2d 895 (Tex. Civ. App. 1933) ("most unusual"); Bennett v. Pilot Prods. Co., 120 Utah 474, 235 P.2d 525 (1951) (1 in 1000).

[7] *See* Mogensen v. Hicks, 253 Iowa 139, 110 N.W.2d 563 (1961). *See generally* Note, *Cigarettes and Vaccine: Unforeseeable Risks in Manufacturers' Liability under Implied Warranty*, 63 Colum. L. Rev. 515, 527 (1963).

[8] Tinnerholm v. Parke, Davis & Co., 411 F.2d 48 (2d Cir. 1969); Sterling Drug, Inc. v. Cornish, 370 F.2d 82 (8th Cir. 1966); Carter v. Yardley, 319 Mass. 92, 64 N.E.2d 693 (1946).

[9] Sterling Drug, Inc. v. Cornish, 370 F.2d 82 (8th Cir. 1966); Branchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E.2d 697 (1939).

When a manufacturer, having knowledge of the harm a drug could cause, fails to warn the consuming public of dangers attendant in the use of the drug,[10] the drug is considered "legally defective."[11] Again, the knowledge that the drug is dangerous may be constructive; the manufacturer must have known or should reasonably have known of the drug's dangerous propensities.[12] Because the manufacturer is held to be an expert with respect to the drug it produces, the manufacturer has a continual duty to test its product and to keep abreast of any advances in connection with it.[13] Where the drug was not known to be defective when first placed on the market, but defects subsequently become apparent, the manufacturer may be required to warn the public at the time the danger becomes apparent.[14]

II. Applicability of Strict Liability to Allergic Drug Reactions

Generally, the doctrine of strict tort liability is inapplicable to allergic drug reactions. Mere proof by the plaintiff that his injury was caused by the product used in the manner and for the purpose intended is insufficient to invoke the doctrine because there is no proof of a "defective" product. The victim of an allergenic drug reaction can recover under the doctrine of strict liability in tort only if he first proves a breach of the manufacturer's duty to warn. The courts have semantically constructed "defect" from failure to warn. This breach of duty may be established by showing either (1) that the manufacturer did not warn of a known danger[15] or (2) that the manufacturer gave inadequate warnings.[16]

Toole v. Richardson-Merrell, Inc.[17] involved a drug known as MER/29 which was sold for its anticholesterol effect.[18] The plaintiff, after having been treated with the drug for almost a year, began to

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[10] Wright v. Carter Prods. Inc., 244 F.2d 53 (2d Cir. 1957); Crotty v. Shartenberg's-New Haven, Inc., 147 Conn. 460, 162 A.2d 513 (1960); Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N.W. 48 (1913).

[11] *See* Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 Ind. L.J. 301, 331 (1967).

[12] Witt Ice & Gas Co. v. Bedway, 72 Ariz. 152, 231 P.2d 952 (1951); Pedroli v. Russell, 157 Cal. App. 2d 281, 320 P.2d 873 (1st Dist. Ct. App. 1958).

[13] O'Hare v. Merck & Co., 381 F.2d 286 (8th Cir. 1967); Wright v. Carter Prods., Inc., 244 F.2d 53 (2d Cir. 1957); Bine v. Sterling Drug, Inc., 422 S.W.2d 623 (Mo. 1968).

[14] *E.g.*, Bine v. Sterling Drug, Inc., 422 S.W.2d 623 (Mo. 1968).

[15] *See* Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1st Dist. Ct. App. 1967).

[16] *See, e.g.*, Sterling Drug, Inc. v. Yarrow, 408 F.2d 978 (8th Cir. 1969).

[17] 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1st Dist. Ct. App. 1967).

[18] *See* Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 Calif. L. Rev. 116, 117-20 (1968).

develop serious eye problems. Evidence was introduced showing that the manufacturer had not disclosed to the Food and Drug Administration (FDA) the full extent of its research as to possible side effects. This resulted in FDA approval without a consideration of all relevant data. The prescribing physician, in testifying for the plaintiff, stated that the drug would not have been administered had he known of the possible side effects, because the risk of harmful effects would outweigh any benefits which might be obtained. The drug manufacturer contended that it was exempted from the doctrine of strict liability in tort, arguing that the drug had been properly prepared and marketed and was incapable of being made safe for intended use. The court found, however, that the manufacturer was strictly liable for failing to give adequate and timely warning of the potential danger after it had become known.

In its decision the court advanced three positions with respect to strict liability in allergic drug reaction cases: (1) the factual situation surrounding manufacture and marketing determines whether strict liability will be imposed; (2) the manufacturer will not be held to strict liability if the drug is properly produced and adequate directions and warnings are coupled with its sale; and (3) a showing of improper preparation or inadequate warning may bring about the imposition of strict liability upon the manufacturer.

Similarly, in *Sterling Drug, Inc. v. Yarrow,*[19] the drug manufacturer was liable for failing to give adequate warning about a drug it produced for treatment of arthritic conditions. The plaintiff recovered damages for a permanent 80 percent vision loss. Although the manufacturer had furnished the doctor with literature warning of possible side effects, meeting the requisite FDA requirements, the court held that the jury was justified in imposing liability.

The evidence showed that the doctor relied upon oral information from company representatives as to possible deleterious effects of the drug and was never informed of this side effect. In its decision the court cited section 402A[20] and comment *k*[21] of the *Restatement (Second) of*

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[19] 408 F.2d 978 (8th Cir. 1969).

[20] (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

Torts, discussing liability in the case of unavoidably unsafe products. The court indicated that although dispersion of such drugs did not make the manufacturer strictly liable for unfortunate consequences resulting from their use, improper preparation and inadequate warning would invoke strict liability. The court expressly held that after the drug company realized that the drug possessed dangerous side effects, the drug company had a duty to inform the doctor of the potential dangers.

Foreseeability is often a determinative factor in decisions concerning the imposition of strict liability upon the drug manufacturer. When the evidence shows that the adverse effect of the drug was long delayed and unpredictable, many courts have refused to give a jury instruction on strict liability. In *Christofferson v. Kaiser Foundation Hospitals*[22] a damage action was maintained against a drug manufacturer, physicians, a health plan, and a drug retailer, for injuries consisting of irreversible limitation of vision after prolonged use of "Aralen" (chloroquine disphosphate), a drug administered for treatment of a skin ailment. The court, in affirming a judgment for the manufacturer, held that strict liability was inapplicable since the adverse effect of the drug was long delayed, unforeseeable, and unrelated to the ailment it was designed to cure, and since the adverse effect was an extremely rare result of the use

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(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[21] There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease invariably leads to a dreadful death, both the marketing and use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time or opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

RESTATEMENT (SECOND) OF TORTS § 402A, Comment *k* (1965) (emphasis in original).

[22] 15 Cal. App. 3d 75, 92 Cal. Rptr. 825 (1st Dist. Ct. App. 1971).

of a medication distinctly valuable in the treatment of serious ailments.[23]

III. The Duty to Warn: The Prevalence of Injury Versus the Gravity of Harm

The duty to warn has become the primary focus of strict drug liability. Usually the burden has been placed upon the injured consumer to prove that he is a member of an appreciable class of similarly affected persons whom the manufacturer should have anticipated as being susceptible to injuries arising from use of the product.[24] In *Johnston v. UpJohn Co.*,[25] an action was brought against a drug manufacturer for damages resulting from the plaintiff's severe reaction to the defendant manufacturer's drug, "Lincocin." The court held that because an insert accompanying the drug accurately described adverse reactions of which the manufacturer was aware and because it had never received reports of allergic reactions as severe as the plaintiff's, the manufacturer could not have known, and therefore had no duty to warn, of reactions such as the plaintiff had suffered.

In cases involving cosmetics, most courts have allowed recovery when the evidence shows that an ingredient in the product exists to which an appreciable class of persons is allergic and that the plaintiff is a member of the class.[26] With respect to drugs, however, the quantitative concept of "appreciable class" has often been disregarded and a duty to warn has been imposed, notwithstanding that the number of persons potentially affected by the product might be negligible.[27] In

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[23] In Sterling Drug, Inc. v. Cornish, 370 F.2d 82 (8th Cir. 1966), the drug manufacturer was held liable, however, for retinal injury sustained by the plaintiff after using the same drug involved in the *Christofferson* case. The court based liability upon the fact that the defendant knew or should have known that some consumers would be harmed by the drug and was negligent in failing to warn doctors, including the plaintiff's doctor, of potential adverse effects. Additionally, in Kershaw v. Sterling Drug, Inc., 415 F.2d 1009 (5th Cir. 1969), the defendant was held liable for failing to give timely warning of the danger of "Aralen", since the manufacturer reasonably should have known of the drug's properties several years before it issued warnings.

[24] *See* Oakes v. Geigy Agricultural Chem., 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (3d Dist. Ct. App. 1969); Crotty v. Shartenberg's-New Haven, Inc., 147 Conn. 460, 162 A.2d 513 (1960); Gravis v. Abbott Lab., 462 S.W.2d 410 (Tex. Civ. App.), *aff'd in part and rev'd in part on other grounds*, 470 S.W.2d 639 (Tex. 1970); Alberto-Culver Co. v. Morgan, 444 S.W.2d 770 (Tex. Civ. App. 1969); Esbrog v. Bailey Drug Co., 61 Wash. 2d 347, 378 P.2d 298 (1963); 21 Sw. L.J. 678, 680-81 (1967).

[25] 442 S.W.2d 93 (Mo. 1969).

[26] Crotty v. Shartenberg's-New Haven, Inc., 147 Conn. 460, 162 A.2d 513 (1960) (hair remover); Alberto-Culver Co. v. Morgan, 444 S.W.2d 770 (Tex. Civ. App. 1969) (hair dye); Esbrog v. Bailey Drug Co., 61 Wash. 2d 347, 378 P.2d 298 (1963) (hair tint).

[27] In Wright v. Carter Prods. Inc., 244 F.2d 53 (2d Cir. 1957), although the plaintiff

Basko v. Sterling Drug Co.,[28] the plaintiff, after having been treated with the defendant-manufacturer's drug for a number of years, suffered irreversible eye damage. The plaintiff contended that her injury was caused by a very rare allergenic drug reaction. Expert testimony established that the alleged side effect had an incidence of less than one-half of 1 percent, or perhaps as low as one-tenth of 1 percent. The court, in striking down a jury instruction that the duty to warn applied only where the danger involved an appreciable number of users, held that the manufacturer was obligated to warn when the drug may affect only a small number of allergic users and that the duty to warn attaches regardless of whether the number of persons affected could be said to be appreciable.[29]

A leading case on defective warning in strict liability is *Davis v. Wyeth Laboratories*.[30] The plaintiff had been inoculated with Sabin Type 3 polio vaccine in a community mass immunization effort. The vaccine was given to the public in clinics without a physician being present to administer the drug and evaluate in each instance whether the vaccination was worth the potential risks involved. Upon suffering a severe reaction to the vaccine, the plaintiff sued on the basis of several theories. Without addressing the plaintiff's allegations of negligence, the court held the manufacturer strictly liable for failing to warn the consumer of the drug's potential dangers. The court noted that although this was a prescription drug, the warning must be given directly to the consumer if there is no intervening physician. On the theory of strict liability, the court held that failure to warn the consumer of the dangers of the product rendered the product defective or dangerous.[31]

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was unable to establish the existence of an "appreciable" class of similarly affected persons, the court granted recovery. "[W]e believe that duties to warn are not, in all cases, measured by solely quantitative standards." *Id.* at 56. *See also* Davis v. Wyeth Lab. Inc., 399 F.2d 121 (9th Cir. 1968); Sterling Drugs, Inc. v. Cornish, 370 F.2d 82 (8th Cir. 1966).

[28] 416 F.2d 417 (2d Cir. 1969).

[29] *But see* Gravis v. Abbott Lab., 462 S.W.2d 410 (Tex. Civ. App.), *aff'd in part and rev'd in part on other grounds*, 470 S.W.2d 639 (Tex. 1970), holding that strict tort liability is inapplicable where the injury results from an unpredictable and unavoidable allergy which is not known to occur in an appreciable number of persons.

[30] 399 F.2d 121 (9th Cir. 1968).

[31] *Id.* at 128. In its opinion the court noted:

> [W]e reject [the manufacturer's] contention that the rule [of strict liability] applies only where unreasonable danger results because of an ascertained "defect" or "impurity" in the product, and since this . . . [polio vaccine] was precisely what it intended to be, there was no such defect. The true test in a case of this kind is whether the product was unreasonably dangerous.
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> . . . .
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> We conclude that the facts of this case imposed on the manufacturer a duty to warn the customer (or make adequate provisions for his being warned) as to

Another decision adopting strict liability for failure to warn was *Sterling Drug, Inc. v. Yarrow*.[32] The claimant brought an action against the manufacturer of a drug containing chloroquine for the side effect injury to her eyes. The court held that when a drug is manufactured without negligence, yet is unreasonably dangerous because no adequate warning of a side effect is given, the manufacturer may be held liable under the strict tort liability doctrine for the injury resulting from the failure to give a warning reasonable under the circumstances.[33]

The same manufacturer was also held liable in *Singer v. Sterling Drug, Inc.*,[34] wherein chloroquine was again the allergy-inducing agent. The court held that when there is no evidence of drug misuse and when the manufacturer, with knowledge of the risks involved, fails to give adequate warning to physicians prescribing the drug, strict liability will be imposed.

An analysis of these cases reveals that the duty to warn of possible adverse effects extends to that class of persons for which the drug was intended. With respect to the duty to warn, it is essential that the following two situations be clearly distinguished: (1) when the drug is prescribed by a physician; and (2) when there is no physician involved in prescribing the drug, such as occurs in public clinics. Where a prescription drug is involved, courts have held that warning the doctor who will dispense the drug to the patient is sufficient.[35] These holdings are grounded on the reasoning that the physician is more capable of determining whether the drug which he administers will affect his patients adversely. Where there is no physician involvement in administering the drug, however, the warning must reach the ultimate consumer.[36]

The obligation to warn as affected by the risk of injury is perhaps best summarized as follows:

> Where the allergy is so extremely rare as to amount to almost a personal idiosyncrasy, or where it is a very infrequent one, found in only an insignificant percentage of the population, and the threatened harm is not very serious, the tendency has been to hold that the seller need not give warning. But if it is one common to any substantial, even though

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risks involved, and that failure to meet this duty rendered the drug unfit in the sense that it was thereby rendered unreasonably dangerous. Strict liability, then, attached to its sale in the absence of warning.

Id. at 130.

[32] 408 F.2d 978 (8th Cir. 1969).

[33] *Id.* at 992-93.

[34] 461 F.2d 288 (7th Cir.), *cert. denied*, 409 U.S. 878 (1972).

[35] Tinnerholm v. Parke, Davis & Co., 411 F.2d 48 (2d Cir. 1969); Magee v. Wyeth Lab., Inc., 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (2d Dist. Ct. App. 1963).

[36] Sterling Drug, Inc. v. Cornish, 370 F.2d 82 (8th Cir. 1966).

> relatively small, number of possible users, and the consequences are more serious, the courts have tended to require the warning, and without it to find negligence.
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> It would, however, be an oversimplification to reduce all this merely to the percentage of those who might be affected, and to ignore the seriousness of the harm to be expected, and the expert knowledge which the defendant has or should have of the dangers. Quite rare side effects of drugs and the like have been included within the duty to warn; and the most extreme case of all required a warning as to the possible dangers of oral vaccine for poliomyelitis, where the evidence was that the risk was only to one person in a million. The allergy cases have tended to reject any exclusively quantitative standard, and to look instead to the overall danger.[37]

IV. When is a Warning Adequate?

After determining the propriety of the duty to warn, the element of adequacy of the warning arises. The adequacy of a warning is usually a question of fact in each case.[38] The warning should be specific in describing possible dangers. A warning simply stating that the product is dangerous is inadequate;[39] and an insufficient warning has been held to have the same legal effect as no warning whatsoever.[40] The duty to warn has also not been satisfied where the dangers are minimized by promotions or advertisements used in selling the drug.[41] A substantial damage award was upheld in *Stevens v. Parke, Davis & Co.*,[42] a wrongful death action which arose as the result of administration to the decedent of the drug chloromycetin. Although a warning had been given in compliance with regulations of the FDA, the court held that the manufacturer had not discharged its duty to warn the medical profession of possible dangers in the use of the drug. Only a minimal warning had been given, and it had been nullified by defendant's overpromotion of the drug through a strong sales program, including visits to doctors by defendant's "detail men" and advertisement of the drug by various means.[43]

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[37] W. Prosser, Torts § 96, at 648-49 (4th ed. 1971).

[38] Carmen v. Eli Lilly & Co., 109 Ind. App. 76, 32 N.E.2d 729 (1941); Marcus v. Specific Pharm., 82 N.Y.S.2d 194 (Sup. Ct. 1948).

[39] Gonzalez v. Virginia-Carolina Chem. Co., 239 F. Supp. 567 (E.D.S.C. 1965).

[40] Crane v. Sears Roebuck & Co., 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (4th Dist. Ct. App. 1963).

[41] Tinnerholm v. Parke, Davis & Co., 411 F.2d 48 (2d Cir. 1969); Love v. Wolf, 249 Cal. App. 2d 822, 58 Cal. Rptr. 42 (3d Dist. Ct. App. 1967)

[42] 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973).

[43] *See also* Love v. Wolf, 249 Cal. App. 2d 822, 58 Cal. Rptr. 42 (3d Dist. Ct. App. 1967), where the manufacturer was held liable in a suit for injuries caused by chloromycetin. The court held that the evidence warranted a verdict for the plaintiff on the

Liability for an inadequate warning has been imposed where the warning was "lost" within other literature furnished with the product.[44] The warning must be precise,[45] strong and unambiguous,[46] and placed in a noticeable position.[47] The force of the warning should be commensurate with the potential danger.[48]

V. The Physician's Liability for Allergic Drug Reactions

Because the physician is often joined as party defendant with the drug manufacturer in allergic drug reaction cases, a discussion of the physician's liability is necessary. Ordinarily, proof that an injury was due to an allergy will remove the physician from the scope of liability for the injury.[49] If, however, evidence shows that the injury might have been partly the result of the doctor's negligence, liability may be imposed.

When a true allergy or hypersensitivity has been proved, the courts have been hesitant to apply the doctrine of res ipsa loquitur.[50] This doctrine would allow a jury to find a physician negligent upon proof that (1) the injury occurred; (2) such injuries ordinarily do not arise from such treatment without negligence; and (3) the drug was in the control of the physician. In *Campos v. Weeks*[51] the patient developed an infection from a lacerated finger. Before administering an injection of penicil-

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grounds that the overprescription of the drug was caused by the defendant manufacturer's overpromotion.

[44] Crane v. Sears Roebuck & Co., 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (4th Dist. Ct. App. 1963).

[45] Lovejoy v. Minneapolis-Moline Power Implement Co., 248 Minn. 319, 79 N.W.2d 688, 693 (1956).

[46] Crouse v. Wilbur-Ellis Co., 77 Ariz. 359, 272 P.2d 352 (1954).

[47] Marigny v. Dejoie, 172 So. 808 (La. App. 1937).

[48] Tampa Drug Co. v. Wait, 103 So. 2d 603 (Fla. 1965).

[49] Ayers v. Parry, 192 F.2d 181 (3d Cir. 1951); Hall v. United States, 136 F. Supp. 187 (W.D. La. 1955); Campos v. Weeks, 245 Cal. App. 2d 678, 53 Cal. Rptr. 915 (2d Dist. Ct. App. 1966); Tangora v. Matanky, 231 Cal. App. 2d 468, 42 Cal. Rptr. 348 (2d Dist. Ct. App. 1965); Surabian v. Lorenz, 229 Cal. App. 2d 462, 40 Cal. Rptr. 410 (5th Dist. Ct. App. 1964); Kuttner v. Swanson, 59 Ga. App. 818, 2 S.E.2d 230 (1939); Mogensen v. Hicks, 253 Iowa 139, 110 N.W.2d 563 (1961); Wilson v. St. Francis Hosp. & School of Nursing, Inc., 190 Kan. 150, 373 P.2d 180 (1962); Wells v. McGehee, 39 So. 2d 196 (La. 1949); Fritz v. Parke, Davis & Co., 227 Minn. 210, 152 N.W.2d 129 (1967); Cassidy v. McLaughlin, 205 Minn. 30, 285 N.W. 889 (1939); Cochran v. Brooke, 243 Ore. 89, 409 P.2d 904 (1966).

[50] Ayers v. Parry, 192 F.2d 181 (3d Cir. 1951); Hall v. United States, 136 F. Supp. 187 (W.D. La. 1955); Campos v. Weeks, 245 Cal. App. 2d 678, 53 Cal. Rptr. 915 (2d Dist. Ct. App. 1966); Surabian v. Lorenz, 229 Cal. App. 2d 462, 40 Cal. Rptr. 410 (5th Dist. Ct. App. 1964); DeLaughter v. Womack, 250 Miss. 190, 164 So. 2d 762 (1964).

[51] 245 Cal. App. 2d 678, 53 Cal. Rptr. 915 (2d Dist. Ct. App. 1966).

lin, the attending physician asked whether the patient had ever experienced an adverse reaction to the drug. After the patient answered in the negative, the injection was given resulting in anaphylactic shock and death. In finding that the physician had not been negligent, the court specifically held that the doctrine of res ipsa loquitur was inapplicable.[52] The court reasoned that no reliable test for an anaphylactic reaction existed except questioning the patient. Related is the case of *Tangora v. Matanky*,[53] where a wreck victim developed a strep throat while under treatment for previous injuries. The physician, again after careful questioning about prior reactions to the drug, to which the victim replied in the negative, administered penicillin. The patient went into anaphylactic shock and died within 10 minutes. In finding that the physician was not negligent, the court stated that accepted treatment in the case indicated the administration of penicillin. The court stressed the general rule in malpractice cases that the fact that a particular injury results does not prove negligence in and of itself. The court further noted that anaphylactic shock is an inherent risk in the use of penicillin and does not indicate negligence when it occurs.[54]

Courts have held the physician liable where the patient's medical history should have alerted the physician to the existence of an allergy, regardless of proof that the injury was due to hypersensitivity.[55] In *Yorston v. Pennell*[56] the plaintiff was aware of his allergy to penicillin and carried a note in his wallet to that effect. After involvement in an industrial accident, he was taken to the emergency room of a nearby hospital. His history was taken by an extern, to whom he reported his allergy and to whom he handed the note. No mention was made of the allergy on the patient's chart. Penicillin was administered during surgery and again after the patient regained consciousness, even though the patient protested that he was definitely allergic to the drug. As a result of the allergy, the patient suffered a cardiovascular injury. The court held that the attending surgeon was legally responsible for the negligent action of his subordinate.

Apparently, a physician's failure to discover in the drug literature a hypersensitivity or a condition for which a contraindication is stated

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[52] *Id.* at 679, 53 Cal. Rptr. at 918.

[53] 231 Cal. App. 2d 468, 42 Cal. Rptr. 348 (2d Dist. Ct. App. 1965).

[54] For an excellent discussion of res ipsa loquitur as applied to the physician, see Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 397 P.2d 161, 166-68, 41 Cal. Rptr. 577, 583-84 (1964). *See also* Seneris v. Haas, 45 Cal. 2d 811, 291 P.2d 915, 922-26 (1956); Mayor v. Dowsett, 240 Ore. 196, 400 P.2d 234 (1965).

[55] Decho v. Shutkin, 144 Conn. 102, 127 A.2d 618 (1956); Yorston v. Pennell, 397 Pa. 28, 153 A.2d 255 (1959).

[56] 397 Pa. 28, 153 A.2d 255 (1959).

will support an action for negligence if adequate history or reasonably available laboratory tests would have led to the discovery. A physician risks an adverse verdict if he prescribes a drug for a condition not known to be benefited by it, or for a condition less serious than that for which the drug is indicated, and an allergenic reaction results.[57] If the physician does not make the test necessary to determine hypersensitivity before the drug is administered[58] or continues therapy after a reaction has been observed,[59] the physician may be liable despite evidence that the injury resulted from hypersensitivity. Implicit in all the decisions is the conclusion that the physician is not liable for the reaction if he has used all reasonable means to prevent it, but, to avoid liability for the injury to the patient once the reaction occurs, he must take prompt action to combat it.[60] Failure to act appropriately would indicate lack of skill, care, and knowledge which would subject him to liability for a failure to use standard and accepted practice.

The general rule to be gleaned from the reported cases is that a physician is not liable for injuries resulting from adverse reactions to a drug unless the physician's negligence caused the injury. Failure to note a history of allergy, failure to test for signs of a reaction, failure to stop treatment with the drug once reactions have been observed, failure to provide treatment to avert a reaction, and treatment with a drug not proper for the illness are acts and omissions that have been held to constitute such negligence.

VI. Strict Liability and the Restatement of Torts

Section 402A of the *Restatement (Second) of Torts* states the fundamental rule of strict liability.[61] Before this section can be accurately applied to allergenic drug reactions, an examination of two comments to the section is essential.

Comment *j* entitled "Directions or Warning" provides:

> Where, however, the product contains an ingredient to which a substantial number of people are allergic . . . the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.
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[57] Rotan v. Greenbaum, 273 F.2d 830 (D.C. Cir. 1959).

[58] Winstead v. Hildenbrand, 159 F.2d 25 (D.C. Cir. 1946); Neely v. St. Francis Hosp. & School of Nursing, Inc., 188 Kan. 546, 363 P.2d 438 (1961).

[59] Parrish v. Clark, 107 Fla. 598, 145 So. 848 (1933).

[60] Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 397 P.2d 161, 41 Cal. Rptr. 577 (1964).

[61] *See* note 20 *supra*.

> Where warning is given, the seller may reasonably assume that it will be read and heeded; and *a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.*[62]

Comment *k*, entitled "Unavoidably unsafe products" directly supplements this reasoning:

> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. . . . Such a product, properly prepared, *and accompanied by proper directions and warning, is not defective*, nor is it *unreasonably* dangerous.[63]

In basing a claim for damages upon strict liability, the plaintiff is afforded advantages not provided for in warranty and negligence theories. Privity is not required,[64] and due care in the manufacture of the product provides no defense.[65]

Obviously, a manufacturer should not be liable for damages simply for marketing a product which injures a consumer; therefore, strict liability must rest on evidence that the product was defective or unsuitable. For the most part, the term "unsuitable" has been utilized by courts finding liability based on a warranty theory, whereas the term "defective" usually refers to strict liability in tort. Accordingly, section 402A of the *Restatement (Second) of Torts* makes "defective" the key to liability.[66] Before being allowed to recover, the plaintiff must show that something is "wrong" with the product,[67] *i.e.*, that the product contained a defect which rendered it unreasonably dangerous to him. The comments to section 402A indicate that the occurrence of a defect is to be viewed from the consumer's perspective. The liability of the manufacturer is decided by the presence of a "defect" within the product which is defined as "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[68] "Unreasonably dangerous" is interpreted to mean dangerousness to an extent which would not be contemplated by the ordinary consumer.[69] Therefore, even though a product is produced exactly as the manufacturer has

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[62] RESTATEMENT (SECOND) OF TORTS, § 402A, comment *j* (1965) (emphasis added).

[63] *Id.*, § 402A, comment *k* (emphasis added).

[64] *Id.*, § 402A(2) (b).

[65] *Id.*, § 402A(2) (a).

[66] *Id.*, § 402A(1).

[67] Dickerson, *supra* note 11, at 304; Rheingold, *What Are the Consumer's "Reasonable Expectations"?*, 22 BUS. LAW. 589, 591-92 (1967).

[68] RESTATEMENT (SECOND) OF TORTS § 402A, comment *g* (1965).

[69] *Id.*, § 402A, comment *i*.

intended, it may be regarded as defective if it is unreasonably dangerous to a particular plaintiff.[70]

Even though section 402A is customarily thought to impose liability without fault, in the warning cases it does not.[71] Because the product must be unreasonably dangerous before section 402A can be invoked, essentially the same result is reached under traditional negligence theory in cases of the manufacturer's alleged failure to supply adequate warnings with its product. If the manufacturer "adequately" warns, his drug is not "defective" within the meaning of comments *j* and *k*, even if the warning does not render the product absolutely safe. Moreover, comment *j* limits the manufacturer's duty to warn to those instances in which reactions are foreseeable in a substantial number of users. Therefore by relating comments *j* and *k* to section 402A, some courts have held that the theories of strict liability, breach of implied warranty, and negligence are interchangeable in drug injury cases.[72]

Recent decisions have indicated a reluctance on the part of some courts to impose section 402A strict liability upon drug manufacturers. *Gravis v. Parke, Davis & Co.*[73] was a strict liability action by the plaintiff, a surgery patient, for injuries allegedly resulting from the administration during an operation of a spinal anesthetic composed of drugs produced by multiple defendants. The court held that no showing had been made that any of the defendants' drugs were defective. The court stressed that, even in a strict liability case, the showing of a defect is indispensable. The court further noted that although the drugs involved reached the hospital and the operating room in sealed containers, that fact did not in itself establish a defect but merely gave rise to an inference that the product reached the user without substantial change.

VII. Why Strict Liability for Allergies?

Because allergic reactions to products usually involve items which are manufactured exactly as they were intended and which serve the purpose for which they were designed, why hold a manufacturer liable

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[70] *See* Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 15 (1965).

[71] *E.g.*, Singer v. Sterling Drug, Inc. 461 F.2d 288 (7th Cir.), *cert. denied*, 409 U.S. 878 (1972); Basko v. Sterling Drug, Inc., 416 F.2d 417 (2d Cir. 1969); Christofferson v. Kaiser Foundation Hosp., 15 Cal. App. 3d 75, 92 Cal. Rptr. 825 (1st Dist. Ct. App. 1971); McLeod v. W.S. Merrell Co., 174 So. 2d 736 (Fla. 1965); Cochran v. Brooke, 243 Ore. 89, 409 P.2d 904 (1966); Gravis v. Abbott Lab., 462 S.W.2d 410 (Tex. Civ. App.), *aff'd in part and rev'd in part on other grounds*, 470 S.W.2d 639 (Tex. 1970).

[72] *See* Basko v. Sterling Drug, Inc., 416 F.2d 417, 426 (2d Cir. 1969); Davis v. Wyeth Lab., Inc., 399 F.2d 121, 126 (9th Cir. 1968); Grinnell v. Charles Pfizer & Co., 274 Cal. App. 2d 424, 79 Cal. Rptr. 369 (1st Dist. Ct. App. 1969).

[73] 502 S.W.2d 863 (Tex. Civ. App. 1973).

that was without fault, having prepared a product which is beneficial to a substantial majority of the population?

Virtually all products intended for personal bodily use possess the potential to produce dangerous and unpredictable side effects in a certain percentage of persons.[74] Injuries arise even though adequate warnings and instructions were given concerning the particular hazard which brought about the victim's injury. The consumer may be unaware of the allergy, and an effort to determine the existence of an allergy before using the product may prove inconclusive. Why then should a manufacturer be held liable in an area where perfection is unattainable? This type of inquiry has generated much dispute as to the propriety of imposing strict liability on a manufacturer in this situation.[75]

The imposition of strict liability has sometimes been justified on the theory that it will give incentive for due care within the industry.[76] With respect to drugs, however, it appears that this theory can be refuted.[77] Many factors require drug manufacturers to conform to a high standard of care, including (1) stringent governmental standards and supervision, (2) stiff competition in the drug industry, (3) concern for reputation, and (4) exacting scientific and medical standards. Additionally, the public's confidence in a product would soon be lost by an abundance of serious side effects. This does not mean, however, that an application of general negligence law principles would necessarily result in as high a standard as that imposed by strict liability. Certainly a manufacturer could be persuaded to proceed with greater care in drug production if cognizant of the possible applicability of strict liability to injuries caused by its product.

A second basis for the imposition of strict liability on the drug manufacturer is its ability to distribute the risk of loss to all users of the product.[78] Competitors which develop a safer substitute will have a price

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[74] *See* Whitmore, *supra* note 2.

[75] *See, e.g.*, Keeton, *Products Liability—Drugs and Cosmetics*, 25 VAND. L. REV. 131 (1972); Schattman, *supra* note 4; Wade, *supra* note 70; Note, *Strict Liability for Drug Manufacturers: Public Policy Misconceived*, 13 STAN. L. REV. 645 (1961).

[76] *See* James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957). *Contra*, Freedman, *Products Compensation: Who's Pushing Whom?*, 20 BUS. LAW. 167 (1964).

[77] *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1119 (1960); Note, *supra* note 75, at 646-47; Note, *supra* note 7, at 530.

[78] *See* James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54 CALIF. L. REV. 1550, 1556-58 (1966). The author reasons that because the inevitability of allergic and other adverse reactions from elements in drugs and cosmetics is as well known as the inevitability and certainty of failure in construction, it is difficult to justify a distinction between an unreasonably dangerous condition arising from a miscarriage in the manufacturing process and an unreasonably dangerous condition attributable to society's lack of scientific development.

advantage in the market. The manufacturer of the defective drug will be forced to cure the defect or remove it from the market.

VIII. Defenses to Strict Liability

If the allergic consumer fails to show that the drug was defective, he cannot recover against the manufacturer under the doctrine of strict liability. This failure is not a true defense, but a deficiency in meeting the necessary burden of proof. Three theories have been advanced upon which a defense may be established:[79]

(1) the failure of the injured party to recognize the risk;

(2) the continued use of the product after the defect and danger associated with it became known;

(3) injury as a result of product misuse.

Comment *n*[80] of *Restatement (Second) of Torts* section 402A has established that contributory negligence does not exist when the injured party fails to detect a product's defectiveness.[81] An injured party under the strict liability theory has no duty to inspect for defects or guard against possible defects. When, however, the injured party has knowledge of a danger and voluntarily and unreasonably proceeds to use the defective product, then assumption of risk may be a defense.[82] This defense would come into play when the injured party has detected the defect or has been warned of the defect but proceeds to use the product to his own detriment. Under strict liability, the plaintiff's misuse or failure to follow instructions may be utilized by the manufacturers to rebut the plaintiff's contention that his injuries were caused by the alleged defective condition of the product.[83]

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[79] Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 Utah L. Rev. 267, 268.

[80] Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Restatement (Second) of Torts § 402A, comment *n* (1965).

[81] Noel, *Defective Products, Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 Vand. L. Rev. 93, 106-07 (1972).

[82] Keeton, *Assumption of Products Risks*, 19 Sw. L.J. 61, 66-75 (1965).

[83] *See* Noel, *supra* note 81.

CONCLUSION

As a result of extensive and costly research, as well as good manufacturing practices and other aspects of quality control, the public is constantly being provided with safer and more effective pharmaceutical drugs. Regrettably, drugs powerful enough to battle disease also have the potential to produce adverse side effects. Because of the highly technical composition of most drugs, the courts through substantive statements of law and policy have tried to protect the consumer. The injured consumer has a much greater chance of achieving recovery under strict liability than under negligence and warranty theories.

The doctrine of "risk distribution" has been advanced as the underlying public policy in compensating those injured by technological products.[84] Courts have imposed liability to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that place the products on the market, rather than by injured consumers who are powerless to protect themselves. Underpinning the "risk distribution" doctrine is the notion that the ultimate costs of the injury should be distributed to other segments of society which generally benefit from the product and can more economically absorb the cost brought about by the defective drugs. The drug manufacturer distributes the risk by passing the cost on to the consumer. If the risk lies with the government, its cost will be borne by the taxpayer. If a physician is involved, the risk may be borne by him through malpractice insurance or increased medical costs, rather than by the allergic consumer.[85]

Apparently the theory behind the risk distribution rationale is both social and economic. Before economic losses can be estimated, risks of losses must be ascertained. The drug manufacturer is in the better position to assess the risks inherent in its products and is able to spread the costs of allergic drug reactions among those who benefit from using the drug.

Although a risk is involved with the use of certain drugs, public policy demands that they be used since the benefit of their use far outweighs their disadvantages. Yet public policy does not require that the consumer be ignorant of certain risks involved with a particular drug. Whether the imposition of strict liability—and resultant risk distribution—on the drug manufacturer would reduce the frequency of allergic reactions is unclear. The imposition of strict liability, however,

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[84] Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1067-69 (1972).

[85] Merrill, *Compensation for Prescription Drug Injuries*, 59 VA. L. REV. 1, 102-19 (1973).

would provide incentives for more extensive testing procedures, and perhaps more important in the field of allergic reactions, the manufacturer would be motivated to stress, through the use of literature, hazards connected with the drug.

Strict liability, where its requisites are satisfied, is not an undue burden upon the manufacturer, which can take necessary steps to shift its losses. Strict liability would allow the allergic consumer to recover when (1) the product produces injury that could not have been reasonably anticipated, and (2) there is no misuse of the product on his part. A drug which produces an allergic reaction in an individual is defective as to that individual. The manufacturer's contention that its drug is safe for the majority of consumers does little to ease the pain suffered by the allergic consumer. Therefore, would it not be better public policy to put the responsibility for the injury on the manufacturer of the drug so that the cost can be spread to the entire society which has gained from the drug? A realization of the necessity of drugs for the general population indicates that compensating tragic consequences suffered by the allergy victim would not unduly burden the drug industry.

Richard F. Yarborough, Jr.

RECENT DECISIONS

Civil Rights—Equal Employment Opportunity—Statute of Limitations for Filing a Charge With the EEOC Is Not Tolled for the Period an Employee Seeks Relief Through a Company's Grievance Procedures

Appellant,[1] a black female discharged by her employer Robbins & Myers, Incorporated, sought reversal of a federal district court's order[2] dismissing her complaint alleging racial discrimination in her discharge under Title VII of the 1964 Civil Rights Act.[3] Fired on October 25, 1971, the appellant had first processed her grievance through company arbitration procedures pursuant to a collective bargaining agreement between defendant and her union. Twenty-three days later the defendant employer rejected appellant's grievance.[4] Electing not to proceed to final arbitration, the appellant filed a charge[5] with the

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[1] The International Union of Electrical, Radio, and Machine Workers, AFL-CIO Local 790 was joined as party plaintiff. Local 790 was originally a party defendant because Guy alleged that it failed to represent her fairly and diligently. By agreement of the parties, however, the union was realigned as a party plaintiff. Guy v. Robbins & Myers, Inc., 525 F.2d 124, 126 (6th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3608 (U.S. April 26, 1976).

[2] Guy v. Robbins & Myers, Inc., 8 EPD ¶ 9572 (W.D. Tenn. 1974).

[3] Civil Rights Act of July 2, 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253, *as amended*, Act of Sept. 6, 1966, Pub. L. No. 89-554, § 8 (a), 80 Stat. 662, *codified in*, 42 U.S.C. §§ 2000e *et seq.* (1970), *as amended*, (Supp. IV, 1974). Title VII prohibits employment discrimination on the basis of race, sex, color, religion, or national origin. Although the 1972 amendments to the Act give the EEOC power to bring suit on the individual's behalf, they were not in force at the time Guy filed her action. Prior to the 1972 amendments the employee was the principal means for enforcing the Act, functioning as a "private attorney general." Jenkins v. United Gas Corp., 400 F.2d 28, 32-33 (5th Cir. 1968); *see* Beaird, *Racial Discrimination in Employment: Rights and Remedies*, 6 Ga. L. Rev. 469, 479 (1972); Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. Ind. & Com. L. Rev. 495 (1966).

At trial Guy also alleged a cause of action under 42 U.S.C. § 1981 (1970). Defendant moved for dismissal on the grounds that Tennessee's 1-year limitations period for civil rights actions, Tenn. Code Ann. § 28-304 (Supp. 1974), barred Guy's claim. Since over 2 years had elapsed since the alleged wrongful discharge, the trial court granted defendant's motion. Subsequent to the ruling, the Supreme Court decided Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), holding that since there is no "specifically stated" or "relevant" federal statute of limitations governing section 1981 actions, the "most appropriate" state statute of limitations ordinarily controls timely filing under section 1981. *Id.* at 462. In the face of *Johnson*, Guy did not appeal the lower court ruling on this issue, and it became final. 525 F.2d at 126.

[4] One of Guy's co-workers filed a grievance on October 27, 1971. The grievance was rejected by the company on November 18, 1971. 525 F.2d at 126.

[5] A charge, or complaint, filed under oath is the first step under Title VII in seeking administrative relief from alleged discrimination. The EEOC must investigate to deter-

Equal Employment Opportunity Commission (EEOC) on February 10, 1972, 108 days after her discharge from employment and 18 days after the 90-day period[6] for the timely filing of a charge.[7] The EEOC granted the appellant written permission[8] to maintain an action against her defendant employer. At trial, the defendant moved for dismissal on the grounds that the plaintiff had not filed her EEOC charge within the time period as provided under Title VII. The plaintiff argued that the time period was tolled during the 23 days she had sought relief under the defendant employer's grievance procedure. The United States District Court for the Western District of Tennessee granted the defendant's motion to dismiss. On appeal[9] to the United States Court of Appeals for

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mine if there is "reasonable cause" to believe there has been unlawful discrimination. If "reasonable cause" is present, the EEOC must first use informal methods of conciliation to resolve the difficulty. Walker, *supra* note 3, at 495; *see* 42 U.S.C. § 2000e-5(a) (1970), *as amended*, § 2000e-5(b) (Supp. IV, 1976).

[6] 42 U.S.C. § 2000e-5(d) (1970), *as amended*, § 2000e-5(c) (Supp. IV, 1974), provides:

> [a] charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) (for state or local agencies) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

No state or local agencies were available to Guy, so the applicable limitation period was 90 days.

[7] Timely filing of a charge with the EEOC is a jurisdictional prerequisite to civil suit under Title VII. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); *see* note 21 *infra*. The Fifth Circuit, however, in Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 928 (5th Cir. 1975), held that

> the ninety day requirement is not "jurisdictional" in the strict sense that compliance with it *vel non* determines the jurisdiction of the district court . . . . Equitable modifications, such as tolling and estoppel . . . should . . . be applied . . . .

[8] Upon a determination that discrimination has taken place and after failure of conciliation efforts, or upon finding that there exists no reasonable cause to believe discrimination has occurred, the EEOC must grant the charging party written permission to sue under Title VII in federal court. This written permission to file suit is commonly know as a "right to sue" letter. 42 U.S.C. § 2000e-5(e) (1970), *as amended*, 42 U.S.C. § 2000e-5(f)(1) (Supp. IV, 1974); *see Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1207-09 (1971).

[9] On appeal, the EEOC, as amicus curiae urged retroactive application of the 1972 amendment to the Equal Employment Opportunity Act, 42 U.S.C. § 2000e-5(e) (Supp. IV, 1974), *amending* 42 U.S.C. § 2000e-5(d)(1970), which extended the time for filing a charge to 180 days. The amendment became effective on March 24, 1972, 42 days after Guy had filed. The majority opinion refused to consider that issue since it was not raised at trial. 525 F.2d at 128. The court noted, however, that since the plaintiff's failure to file within 90 days of her discharge extinguished her claim, it could not be revived by subse-

the Sixth Circuit, *held*, affirmed. The 90-day period prescribed for filing an EEOC charge will not be tolled when a complainant initially seeks relief through a company's grievance procedure established pursuant to a collective bargaining agreement. *Guy v. Robbins & Myers, Inc.*, 525 F.2d 124 (6th Cir. 1975), *certiorari granted*, 44 U.S.L.W. 3608 (U.S. April 16, 1976).

After the War Between the States, a radical Republican Congress attempted to place the recently emancipated Negro on a parity with whites through the adoption of the Civil Rights Acts of 1866[10] and 1871.[11] Although largely dormant until recent times,[12] section 1981,[13] guaranteeing all citizens the right to contract, and section 1982,[14] guaranteeing all citizens the right to own property have been instrumental in achieving economic and social equality for Blacks.[15] These remedies were later joined by others available under Title VII of the Civil Rights Act of 1964.[16] Title VII established the EEOC and granted it

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quent increase in the time for filing a charge with the Commission. *Id.* Judge Edwards dissented on this issue, citing Davis v. Valley Distrib. Co., 522 F.2d 827 (9th Cir. 1975), which allowed retroactive application of the 180-day extension amendment. The dissent urged remand to the trial court for consideration on this issue. 525 F.2d at 129-30.

[10] Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27, *as amended*, Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144, *codified in*, 42 U.S.C. § 1981 (1970).

[11] Civil Rights Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, *codified in*, 42 U.S.C. § 1983 (1970).

[12] For example, "[f]rom 1871 to 1920 section 1983 appears to have been involved in only 21 cases." 2 T. EMERSON, D. HABER, & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1447 (3d ed. 1967).

In Jones v. Alfred H. Meyer Co., 392 U.S. 409 (1968), the Supreme Court revived the 1866 Civil Rights Act by upholding the constitutionality of section 1982. The import of this decision is equally applicable to section 1981. *See* Carsen, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 56 (1972).

[13] 42 U.S.C. § 1981 (1970) provides in part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

[14] 42 U.S.C. § 1982 (1970).

[15] *See* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 449-54 (1974).

[16] Civil Rights Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 241, 253, *codified in*, 42 U.S.C. §§ 2000e *et seq.* (1964), *as amended*, 42 U.S.C. §§ 2000e *et seq.* (Supp. IV, 1974).

Comparing section 1981 with Title VII will reveal differences. *See* Herbert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U.L. REV. 449, 478-83 (1971); Melzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30 (1971); Comment, *Title VII and 42 U.S.C. § 1981: Two Independent Solutions*, 10 U. RICH. L. REV. 339 (1976).

EEOC attempts to conciliate are authorized by 42 U.S.C. § 2000e-5(e) (1970), *as amended*, § 2000e-5(b) (Supp. IV, 1974); however, the Commission's attempted conciliation is not a jurisdictional prerequisite to an individual plaintiff's access to federal court.

powers and remedies for prevention of employment discrimination.[17] Because of the compromises made to assure Title VII's passage,[18] however, the EEOC was granted power only to investigate charges and seek resolution of disputes through conciliation.[19] If conciliation efforts fail, the Commission can then give a charging party permission to bring a private suit in federal court.[20] Resort to court action must be preceded by two jurisdictional requisites: filing of a timely charge with the Commission and receipt of the statutory notice of the right to sue.[21]

Employees, therefore, possess several alternative remedies for racial discrimination in private employment.[22] An aggrieved employee may turn to the

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Jefferson v. Peerless Pumps Hydrodynamic, 456 F.2d 1359, 1361 (9th Cir. 1972); Danner v. Phillips Petroleum Co., 447 F.2d 159, 161 (5th Cir. 1971); Carr v. Conoco Plastics, Inc., 423 F.2d 57, 61 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970); Johnson v. Seaboard Air Line R.R., 405 F.2d 645, 648 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969); *see* Annot., 5 A.L.R. FED. 334 (1970). Section 1981 has no such policy favoring attempted conciliation.

[17] 42 U.S.C. §§ 2000e *et seq.* (1964), *as amended*, (Supp. IV, 1974). For a survey of the federal effort to eliminate discrimination in employment, see Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966).

[18] Civil Rights advocates hoped Congress would grant the EEOC quasi-judicial power similar to that possessed by the National Labor Relations Board; the power to bring suits in court for enforcement of its orders, and the power to hold hearings. To assure passage these provisions were deleted from the final draft of the Act. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 64-68 (1964); *see* Vaas, *supra* note 17, at 433-34. 42 U.S.C. § 2000e-6(a) (1970) empowers the Attorney General to bring a civil action against an employer only when he has "reasonable cause to believe that [an employer] is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights provided by [§§ 2000e *et seq.*]."

[19] 42 U.S.C. § 2000e-5(a) (1970), *as amended*, 42 U.S.C. § 2000e-5(b) (Supp. IV, 1974). This section provides in part:

> If the Commission shall determine . . . that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

See Comment, *Title VII, Civil Rights Act of 1964: Present Operation and Proposals for Improvements*, 5 COLUM. J. LAW & SOCIAL PROB. 1, 5-6 (1969); *Developments in the Law, supra* note 8, at 1200-02.

[20] 42 U.S.C. § 2000e-5(e) (1970), *as amended*, 42 U.S.C. § 2000e-5(f) (Supp. IV, 1974).

> If . . . the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may . . . be brought against the respondent named in the charge . . . .

[21] Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); *accord*, Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969); Dent v. St. Louis-S.F. Ry., 406 F.2d 399, 403 (5th Cir. 1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357, 359 (7th Cir. 1968); Stebbins v. Nationwide Mut. Ins. Co., 382 F.2d 267, 268 (4th Cir. 1967).

[22] In addition to the remedies listed in the text, at least three alternative remedies may be available in certain situations: An aggrieved employee may proceed under 42 U.S.C. § 1983 (1970), if the alleged discrimination occurs under color of state law; he may allege a cause of action under 42 U.S.C. § 1985(3)(1970), where the deprivation of rights

contractual grievance procedure of a collective bargaining agreement between the employer and employee's union,[23] file a Title VII charge with the EEOC, or file suit under section 1981. This multiplicity of remedies precipitates two major issues: (1) When, if ever, does the doctrine of election of remedies bar access to multiple avenues of relief? (2) When, if ever, does a choice of one remedy toll the periods for timely filing of the other actions?[24] Although strong federal policy

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is a consequence of conspiracy, *see* McClellan v. Mississippi Power & Light Co., 526 F.2d 870 (5th Cir. 1976); *cf.* Griffin v. Breckenridge, 403 U.S. 88 (1971); or he may resort to the National Labor Relations Board if the employee claims that the discrimination is an unfair labor practice under § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158 a(1) (1970).

[23] *See* Meltzer, *supra* note 16, at 30-35; Comment, *Labor Arbitration and Title VII of the Civil Rights Act of 1964*, 10 DUQUESNE L. REV. 461 (1972).

[24] In Love v. Pullman Co., 404 U.S. 522 (1972), the Supreme Court embraced a liberal attitude when considering the application of Title VII's technical requirements. The Court noted that "technicalities are particularly inappropriate in a statutory scheme in which laymen . . . initiate the process." *Id.* at 527. The Fifth Circuit perhaps best expresses this policy:

> Mindful of the remedial and humanitarian under-pinnings of Title VII and of the crucial role played by the private litigant in the statutory scheme, courts construing Title VII have been extremely reluctant to allow procedural technicalities to bar claims brought under the act.

Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460-61 (5th Cir. 1970) (footnote omitted).

When Congress passed the 1972 amendments, Act of March 24, 1972, Pub. L. No. 92-261, 86 Stat. 103, the federal circuit courts of appeals were in agreement that resort to contractual remedies tolled the filing time for Title VII. *E.g.*, Moore v. Sunbeam Corp., 459 F.2d 811, 826-27 (7th Cir. 1972); Malone v. North Am. Rockwell Corp., 457 F.2d 779, 781 (9th Cir. 1972); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891-93 (5th Cir. 1970); Phillips v. Columbia Gas, Inc., 347 F. Supp. 533, 538 (S.D. W. Va.), *aff'd without opinion*, 474 F.2d 1342 (4th Cir. 1972); *see* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971). By not addressing the issue, some writers say Congress acquiesced in this position. *See* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 865 (1972). It may be assumed that the 90-day extension provided in the 1972 amendment was not meant to affect adversely the liberal interpretation given to Title VII by prior case law since "[i]t [was] intended . . . that . . . untrained laymen . . . should be given a greater opportunity to prepare charges and file their complaints . . . ." 118 CONG. REC. 7167 (1972) (remarks by Senator Williams); 118 CONG. REC. 7565 (1972) (remarks by Representative Perkins).

> [Amended § 2000e-5(e)] provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in anyway circumscribed by the extension of the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, *and other interpretations of the courts maximizing the coverage of the law are not affected.* It is intended by

and congressional intent favor conciliation over litigation as the preferred method for resolving Title VII disputes,[25] the circuit courts have disagreed about the effect a resort to arbitration should have on the availability of Title VII remedies.

In *Dewey v. Reynolds Metals Co.*,[26] the United States Court of Appeals for the Sixth Circuit held that pursuing contractual grievance procedures to a final conclusion might foreclose the claimant's right to federal remedies. The court based its "preclusion rule" upon the rationale that it would be unfair for an arbitrator's award to be binding only on the employer.[27] The court reasoned that an opposite result "could sound the death knell to arbitration of labor disputes . . . [since] employers would not be inclined to agree to arbitration clauses in collective bargaining if they provide only a one-way street . . . ."[28] Several district courts announced a preclusion rule based upon the doctrines of election of remedies or election of forums.[29] The Sixth Circuit, however, later identified

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> expanding the time period for filing charges in this subsection that aggrieved individuals, who frequently are untrained layman and who are not always aware of the discrimination which is practiced against them, should be given a greater opportunity to prepare their charges and file their complaints and that existent but undiscovered acts of discrimination should not escape the effect of the law through a procedural oversight. Moreover wide latitude should be given individuals in such cases to avoid any prejudice to their rights as a result of government inadvertence, delay or error.

118 CONG. REC. 7167 (1972) (remarks of Senator Williams submitting the report of the House-Senate Conference Committee)(emphasis added).

Whether the 90-day period should be tolled by pursuit of contractual grievances is unclear from the Act. Hutchings v. United States Indus., Inc., 428 F.2d 303, 311 (5th Cir. 1970).

[25] Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1975); Dent v. St. Louis-S.F. Ry., 406 F.2d 399, 404 (5th Cir. 1969); Cox v. Allied Chem. Corp., 382 F. Supp. 309 (M.D. La. 1974). *See generally* Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969); Meltzer, *supra* note 16; Note, *Judicial Deference to Arbitrator's Decisions in Title VII Cases*, 26 STAN. L. REV. 421 (1974); Comment, *Policy Conflict: Should an Arbitration Award be Allowed to Bar a Suit under Title VII of the Civil Rights Act of 1964?*, 20 U.C.L.A.L. REV. 84 (1972).

[26] 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 687 (1971); *see* Comment, Dewey v. Reynolds Metals Co.: *Labor Arbitration and Title VII*, 119 U. PA. L. REV. 684 (1971).

[27] 429 F.2d at 332.

[28] *Id.* The Supreme Court disagreed with this viewpoint:

> The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike . . . . It is not unreasonable to assume that most employers will regard the benefits derived from a no-strike pledge as outweighing whatever costs may result from according employees an arbitral remedy against discrimination in addition to their judicial remedy under Title VII.

Alexander v. Gardner-Denver, 415 U.S. 36, 54-55 (1974).

[29] *See, e.g.*, Oubichon v. North Am. Rockwell Corp., 325 F. Supp. 1033, 1038 (C.D. Cal. 1970), *rev'd*, 482 F.2d 569 (9th Cir. 1973); Newman v. Avco Corp., 313 F. Supp. 1069, 1071 (M.D. Tenn. 1970), *rev'd*, 451 F.2d 743 (6th Cir. 1971); FeKete v. United States Steel

the basis of its decision as res judicata.[30] The res judicata theory reflected the Sixth Circuit's desire for finality and, in its view, effectuated adherence to the federal policy favoring arbitration.[31] Adopting a contra position, the United States Court of Appeals for the Fifth Circuit, in *Hutchings v. United States Industries, Inc.*,[32] held that the rights and remedies under a collective bargaining agreement and those under Title VII are separate and distinct;[33] therefore, an adverse ruling in arbitration does not preclude a subsequent Title VII suit.[34]

The United States Supreme Court considered the effect that resort to the arbitral forum would have on subsequent resort to Title VII remedies in *Alexander v. Gardner-Denver Co.*[35] Mr. Justice Powell, for a unanimous Court, reasoned that since Congress manifestly intended[36] to allow an aggrieved employee to pursue all available remedies for discrimination in employment,[37] neither the doctrine of election of remedies[38] nor waiver[39] preclude an employee's statutory right to de novo consideration of a Title VII claim by a federal court.[40]

Corp., 300 F. Supp. 22, 23 (W.D. Pa. 1969), *rev'd*, 424 F.2d 331 (3rd Cir. 1970); Edwards v. North Am. Rockwell Corp., 291 F. Supp. 199, 208-09 (C.D. Cal. 1968); Washington v. Aerojet-General Corp., 282 F. Supp. 517, 523 (C.D. Cal. 1968).

[30] One year after *Dewey*, the Sixth Circuit, in Newman v. Avco Corp., 451 F.2d 743 (6th Cir. 1971), attempted to clarify its earlier decision by stating: "[W]e do not read *Dewey* as based upon the doctrine of election of remedies." *Id.* at 746. They went on to explain:

> [The] basis of Dewey is a combination of the desire for finality and the belief that arbitration is the sure and sound path to labor harmony—policies which are more accurately expressed in the themes of res judicata and collateral estoppel . . . .

Id. at 746-47 n.1.

[31] *Id.* at 746-47 n.1.

[32] 428 F.2d 303 (5th Cir. 1970), *noted in* 45 N.Y.U.L. Rev. 1316 (1970); *accord*, Oubichon v. North Am. Rockwell Corp., 482 F.2d 568, 572-74 (9th Cir. 1973); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 714-15 (7th Cir. 1969).

[33] 428 F.2d at 311.

[34] *Id.* at 313.

[35] 415 U.S. 36 (1974), *noted in* 43 U. Cin. L. Rev. 661 (1974). Gardner-Denver discharged Alexander from his position as a trainee drill operator alleging that he produced an excessive amount of defective parts. 415 U.S. at 38. Alexander, claiming his discharge was without proper cause, filed a grievance under the collective bargaining agreement. The grievance proceeded to "final and binding" arbitration resulting in a decision adverse to Alexander. *Id.* at 39-43. The EEOC, after a determination of "[no] reasonable cause to believe that a violation" of Title VII had occurred, notified Alexander of his right to sue. *Id.* at 43. The district court concluded that Alexander's election of the arbitral forum precluded suit under Title VII. Alexander v. Gardner-Denver Co., 346 F. Supp. 1012 (D. Colo. 1971).

[36] 415 U.S. at 48 n.9.

[37] *Id.* at 47-49.

[38] *Id.* at 49-51. "The policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of res judicata and collateral estoppel." *Id.* at 49 n.10.

[39] *Id.* at 51-52.

[40] *Id.* at 59-60.

The Court focused closely on the nature of the arbitrator's task,[41] contrasting it with the scope of judicial remedy afforded under Title VII.[42] The Court bolstered its arguments with policy, noting that a "non-preclusion rule" does not undermine either employers' or employees' incentive to arbitrate, since employers garner substantial benefits from no-strike pledges in arbitral agreements[43] and employees will have little incentive to bypass arbitration, a potentially effective means for redress of grievances.[44] By so holding, the Court created an environment which accomodates both the federal policy favoring private settlement of labor disputes and the congressional mandate affording multiple avenues for private litigants to eliminate discrimination in employment.[45] In disavowing *Dewey* and embracing the *Hutchings* rationale, the Court did not, however, clearly decide whether pursuit of contractual grievance remedies tolled the time limitations for filing a Title VII charge with the EEOC.

The Fifth Circuit, in *Culpepper v. Reynolds Metals Co.*,[46] first confronted this problem, holding, with respect to the 90-day filing requirement,[47] that the statute of limitations is tolled by invocation of contractual grievance remedies.[48] "Congress," the court declared, "was attempting to eliminate the problem of 'second thought complaints,' and stale complaints" that could impair the effective functioning of the labor market.[49] But this proscription, the court reasoned, should not serve injurious ends by penalizing an employee who actively pursues his rights; it serves to bar only those who slumber on them.[50] Fifteen months after *Alexander*, the Supreme Court addressed the tolling issue in an employ-

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[41] *Id.* at 56-58.

> [T]he special role of the arbitrator . . . is to effectuate the intent of the parties rather than the requirements of enacted legislation . . . . [Moreover,] the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.

Id. at 56-57.

[42] The Court noted *inter alia* that the arbitral fact-finding process is not equal to judicial fact-finding; the record of proceedings is not as extensive; provisions for discovery, compulsory process, cross-examination, and oath are attenuated if not unavailable; and, arbitrators are under no obligation to explain their ratio decidendi. *Id.* at 57-58.

[43] *Id.* at 54-55.

[44] *Id.* at 59.

[45] *Id.* at 48.

[46] 421 F.2d 888 (5th Cir. 1970).

[47] 42 U.S.C. § 2000e-5(d) (1970), *as amended*, 28 U.S.C. § 2000e-5(e) (Supp. IV, 1974).

[48] 421 F.2d at 891.

[49] *Id.* at 892.

[50] *Id.* Several other courts prior to *Alexander* adopted this rationale. *See, e.g.*, Malone v. North Am. Rockwell Corp., 457 F.2d 779, 781 (9th Cir. 1972); Guerra v. Manchester Terminal Corp., 350 F. Supp. 529, 532 (S.D. Tex. 1972), *modified*, 498 F.2d 641 (5th Cir. 1974); Phillips v. Columbia Gas, Inc., 347 F. Supp. 533 (S.D. W. Va.), *aff'd without opinion*, 474 F.2d 1342 (4th Cir. 1972). The Tenth Circuit, after *Alexander*, in Sanchez v. TWA, Inc., 499 F.2d 1107 (10th Cir. 1974), apparently reasoned that *Alexander* lent support to the theory that a Title VII action is in no way adversely affected by resort to arbitration. *Id.* at 1108.

ment discrimination context. In *Johnson v. Railway Express Agency, Inc.*,[51] Mr. Justice Blackmun reasoned for the majority that timely filing of an employment discrimination charge with the EEOC does not toll the applicable state statute of limitations for a section 1981 action based upon the same facts.[52] Since *Alexander* provides that Johnson's Title VII and section 1981 remedies are "separate, distinct and independant," and since Johnson could have pursued both remedies simultaneously, the Court concluded that by failing to take the minimal steps necessary to preserve each claim independently, "petitioner has slept on his section 1981 rights."[53]

In *The Harrisburg*,[54] the Supreme Court held that a state statute which creates non-common law rights must be strictly construed. The Court held, *inter alia*, that since the state statute of limitations acted as a substantive limitation upon the right, it could not be extended like common law causes of action.[55] In *American Pipe & Construction Co. v. Utah*[56] and *Burnett v. New York Central Railways*,[57] the Court narrowed significantly the application of *The Harrisburg*

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[51] 421 U.S. 454 (1975), *noted in* 61 A.B.A.J. 1260 (1975). Johnson filed a timely charge with the EEOC, alleging his employer discharged him because of his race. Almost 4 years later, the agency gave him notice of his right to institute a civil action under Title VII. Soon afterwards Johnson filed a complaint against REA alleging racial discrimination in violation of Title VII and 42 U.S.C. § 1981 (1970). The District Court dismissed the section 1981 claim as barred by Tennessee's 1-year statute of limitations. TENN. CODE ANN. § 28-304 (Supp. 1974). On appeal, Johnson contended that the statute of limitations was suspended during pendency of his timely filed charge with the EEOC. The Sixth Circuit rejected his argument. Johnson v. Railway Express Agency, Inc., 489 F.2d 525 (6th Cir. 1973).

[52] 421 U.S. at 463.

[53] *Id.* at 466. Prior to *Johnson* the United States Circuit Courts of Appeals conflicted on this point. *Compare* Johnson v. Railway Express Agency, Inc., 489 F.2d 525 (6th Cir. 1974), *with* Macklin v. Spector Freight Sys., Inc., 478 F.2d 979 (D.C. Cir. 1973), *and* Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971).

[54] 119 U.S. 199 (1886), *overruled on other grounds in*, Morange v. States Marine Lines, Inc., 398 U.S. 375 (1969).

[55] 119 U.S. at 214; *accord*, Mathney v. Porter, 158 F.2d 478, 479 (10th Cir. 1946).

[56] 414 U.S. 538 (1974), *noted in* 60 A.B.A.J. 473 (1974). Respondents, the State of Utah, and various governmental units of that state sought to maintain as a class action a treble-damage antitrust action against petitioners, claiming that petitioners had "conspired to rig prices in the sale of concrete and steel pipe in violation of section 1 of the Sherman Act." 414 U.S. at 540-45. The district court denied class status since respondents failed to satisfy Rule 23's numerosity requirement. Utah v. American Pipe & Constr. Co., 49 F.R.D. 17, 21 (C.D. Cal. 1969). Respondents' motions to intervene as plaintiffs were denied by the district court which concluded that the applicable statute of limitations had run since it was not tolled by the institution of a class action in their behalf. Utah v. American Pipe & Constr. Co., 50 F.R.D. 99 (C.D. Cal. 1970). The Supreme Court, per Mr. Justice Stewart, held in relevant part that since Congress, in providing substantive liability under a federal statute, also specified a time limitation upon the initiation of the action, the proper test for allowance of tolling vel non is whether tolling is "consonant with the legislative scheme." 414 U.S. at 557-59.

[57] 380 U.S. 424 (1965), *noted in* 51 A.B.A.J. 576 (1965). Burnett sued in state court

rule by holding that the power of the federal judiciary to toll federal statutes of limitations is not limited by the mere fact that the federal substantive right and the limitation period are intertwined within one statute. Apparently, the crucial issue is whether the demands of federal policy override the need for an absolute prerequisite to court action.[58] In a Title VII context, the United States Court of Appeals for the Fifth Circuit found *The Harrisburg* doctrine, requiring strict construction of non-common law statutes, clearly inapposite.[59]

In *Johnson* the petitioner relied upon *American Pipe* and *Burnett*[60] in arguing that filing an EEOC charge should toll the statute of limitations for a section 1981 action. The court distinguished both cases, emphasizing, in a three-part analysis, that (1) the limitation periods in *American Pipe* and *Burnett* were derived from federal statutes, not state statutes as in *Johnson*; (2) no substantial federal policy demanded protection in *Johnson*; and (3) "most importantly," *Johnson* involved a section 1981 claim, a separate and independent cause of action.[61] Although *Burnett* and *American Pipe* are considered inapplicable, where, as in *Johnson*, state law furnishes the statute of limitations,[62] their logic

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under the Federal Employer's Liability Act alleging injury in the course of employment with New York Central.

The state trial court dismissed the action for improper venue. 380 U.S. at 424-25. Subsequently, petitioner sued on an identical cause of action in federal district court. That court dismissed the complaint, finding that the action was barred by the statute of limitation provision of the FELA. Burnett v. New York Cent. R.R., 230 F. Supp. 767, 768 (S.D. Ohio 1963), *aff'd*, 332 F.2d 529 (6th Cir. 1964). The Supreme Court, per Mr. Justice Goldberg, reversed, holding that since statutes of limitations are enacted principally to ensure justice by barring revival of stale claims, and since Burnett actively pursued vindication of his rights in a state court of competent jurisdiction, federal policy demands a uniform rule with respect to tolling the applicable federal statute of limitations. 380 U.S. at 425-36.

[58] American Pipe & Constr. Co. v. Utah, 414 U.S. 536, 537-38 (1974); Burnett v. New York Cent. R.R., 380 U.S. 424, 426-28 (1965); Midstate Horticultural Co. v. Pennsylvania R.R., 320 U.S. 356, 360-61 (1943); *see Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1187-88 (1950).

[59] Georgia Power Co. v. EEOC, 412 F.2d 462, 466 n.6. (5th Cir. 1969).

[60] 421 U.S. 454, 466 (1975).

[61] *Id.* at 466-67. The Court apparently rejects the theory that timely filing of a charge with the EEOC substantially accomplishes the policy ends which undergird statutes of limitations. Even assuming the charged employer is placed on notice to "protect himself against the loss of evidence . . . fading memories . . . and unfair surprise," Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944), and further assuming that courts may permissibly ignore protracted Title VII litigation, the Court embraces a more rigorous standard; that of "complete identity of the causes of action," as a necessary standard to apply before authorizing tolling under the instant circumstances.

[62] TENN. CODE ANN. § 28-304 (Supp. 1974), the applicable state statute, did not provide for tolling in a *Johnson* fact situation. 421 U.S. at 463. The Court cited examples of other instances where federal courts looked to the applicable state law to ascertain the appropriate statute of limitations when the federal substantive law was silent on the subject. *E.g.*, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 701-04 (1966)(Labor-

may be useful in determining whether Title VII's federal time limitation should be tolled by an employee's pursuit of a contractual aggrievance.[63] For while Congress subjected Title VII's substantive provisions, a non-common law right, to a federal limitation period,[64] there exist competing interests in protecting both arbitration and EEOC conciliation of charges of alleged racial discrimination. This conflict between two federal remedies should invoke a balancing analysis, not strict construction, especially when both remedies require that "laymen unassisted by trained lawyers, initiate the process."[65]

The Fifth Circuit sharply focused on the tolling issue in *Reeb v. Economic Opportunity Atlanta, Inc.*[66] Since the technical requirements of common law pleadings are not applied to initiation of Title VII's administrative processes,[67] and since the 90-day filing requirement is not "jurisdictional" in the sense that timely filing with EEOC vel non determines the power of the court to hear the cause,[68] the court concluded that the broad remedial purposes of the Act are, absent any prejudice to the defendant, best served by applying equitable modifications[69] to the absolute time provisions of the Act.[70] One district court boldly asserted that since *Johnson* "clearly applies only to section 1981 claims" it

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Management Relations Act); Cope v. Anderson, 331 U.S. 461 (1947)(National Bank Act); O'Sullivan v. Felix, 233 U.S. 318 (1914) (Civil Rights Act of 1871); Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906)(Sherman Act); Campbell v. Haverhill, 155 U.S. 610 (1895) (Patent Act).

[63] In *Johnson* the Court relied upon state law to determine what circumstances toll state statutes of limitations. 421 U.S. at 464-65. The Court did not enunciate a per se rule specifically disallowing tolling in all circumstances. Rather, it held that the "overtones and details of application of the state limitation period" are dependent upon state law. *Id.*

[64] 42 U.S.C. § 2000e-5(d)(1970), *as amended*, 42 U.S.C. § 2000e-5(e)(Supp. IV, 1974).

[65] Love v. Pullman Co., 404 U.S. 522, 527 (1972).

[66] 516 F.2d 924 (5th Cir. 1975). The district court found that EOA had notified Reeb of her discharge on September 24, 1970. In the Spring of 1970, Reeb learned that her position had been refilled on November 10, 1969, by an allegedly less qualified male. On April 28, 1970, shortly after she had learned of her replacement, Reeb filed a sex discrimination charge with the EEOC. The district court dismissed her subsequent court action for want of jurisdiction determining that the action was barred for failure to file a charge within "ninety days after the alleged unlawful practice occurred . . . ." *Id.* at 925-26.

[67] *Id.* at 928; *see, e.g.*, Love v. Pullman Co., 404 U.S. 522, 527 (1972); Georgia Power Co. v. EEOC, 412 F.2d 462, 466 (5th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 230-31 (5th Cir. 1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357, 359 (7th Cir. 1968). *See generally* Note, *A Look at* Love v. Pullman, 37 U. CHI. L. REV. 181 (1969).

[68] 516 F.2d at 928; *see* Antoropulos v. Aerojet-General Corp., 295 F. Supp. 1390, 1394-95 (E.D. Cal. 1968).

[69] Such modifications include tolling and estoppel when, as in *Reeb*, defendant "actively sought to mislead" the plaintiff. 516 F.2d at 930. The appropriate modification tolls the running of the time period until "the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Id.*

[70] *Id.*

should not stretch to preclude tolling of Title VII time limitations.[71] Unfortunately, the court did not elaborate its reasoning.

In the instant case, the court reasoned that since the Supreme Court established Title VII and company grievance procedures as "separate, distinct, and independent" remedies,[72] and since Title VII creates rights non-existent at common law,[73] and since the limitation period is a "jurisdictional prerequisite" to court action,[74] the statutory time period will not be tolled by a mere filing of a grievance under a collective bargaining agreement without clear congressional expression to the contrary. The court found it incongruous that private contractual agreements would toll a federal mandatory time limitation. Moreover, the court, noting that Congress had drafted only one exception to the time limitation,[75] concluded that the courts should not add another without legislative approval.[76] Finally, the court held inapplicable cases relied on by the plaintiff since they were decided prior to *Alexander* and *Johnson*.[77]

As the instant decision signifies, the United States Courts of Appeals disagree on the fundamental nature of certain procedural guidelines set out in Title VII. Although *Alexander* clearly announces that only two time periods are "jurisdictional prerequisites"[78] it is unclear whether noncompliance with those periods deprives the federal courts of subject matter jurisdiction.[79] This unfortunate ambiguity confuses proper resolution of the tolling issue. If, as the instant case portends, the 90-day period stands as more than a mere statute of limitations barring stale claims, then failure to file a timely charge with the EEOC necessar-

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[71] Bush v. Wood Bros. Transfer, Inc., 398 F. Supp. 1030, 1033 (S.D. Tex. 1975); *cf.* Williamson v. Chevron Research Co., ___ F. Supp. ___ (N.D. Cal. 1976).

[72] Guy v. Robbins & Myers, Inc., 525 F.2d 124, 126 (6th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3608 (U.S. April 26, 1976); *see* Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974).

[73] 525 F.2d at 127.

[74] *Id., citing* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

[75] 42 U.S.C. § 2000e-5(b)(1970), *as amended*, 42 U.S.C. § 2000e-5(c)(Supp. IV, 1974).

[76] 525 F.2d at 127.

[77] *Id.* at 128. Guy relied on Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970); Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970); Malone v. North Am. Rockwell Corp., 457 F.2d 779 (5th Cir. 1972); Sanchez v. TWA, Inc., 499 F.2d 1107 (10th Cir. 1974).

[78] They are (1) timely filing of a charge with the EEOC; (2) receipt and timely action upon notice of right to sue. Alexander v. Gardner-Denver Co., 414 U.S. 36, 47 (1974).

[79] *Compare* Guy v. Robbins & Myers, Inc., 525 F.2d 124, 127 (6th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3608 (U.S. April 26, 1976), *with* Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 928 (5th Cir. 1975). Assuming that noncompliance defeats subject matter jurisdiction, an emerging body of "erroneous" case law allowing equitable modifications of filing periods now exists. *See, e.g.*, Reeb v. Economic Opportunity Atlanta, Inc. 516 F.2d 924 (5th Cir. 1975); Anderson v. Lunkenheimer Co., ___ F. Supp. ___ (S.D. Ohio 1976); Williamson v. Chevron Research Co., ___ F. Supp. ___ (N.D. Cal. 1976); Bush v. Wood Bros. Transfer, Inc., 398 F. Supp. 1030 (S.D. Tex. 1975). Additionally there would be no need to consider federal policies militating in favor of tolling, for when the court loses jurisdiction, the cause would be lost and equitable doctrines should not be allowed to resuscitate it.

ily bars resort to the courts, for the substantive right has ceased to exist. The Sixth Circuit reaches this result by salvaging *The Harrisburg* doctrine, recently discredited in this context.[80] *American Pipe* and *Burnett* must be used to analyze this jurisdictional issue. The determination of whether federal courts have subject matter jurisdiction over a charge filed more than 90 days after the alleged unlawful employment practice occurred depends not, as the instant court asserts, on whether the statute creating the substantive right also contains a time limitation, but on whether Congress intended the right to be "enforceable . . . after the prescribed time."[81] To ascertain congressional intent, the court's inquiry properly should focus upon the various policy considerations relevant to Title VII causes of action.[82]

Nothing in the legislative history, the Act itself, or past Supreme Court decisions indicates that time limitations contained in Title VII are to be considered "jurisdictional absolutes." Rather, the courts have applied traditional doctrines of equity to modify inflexible time periods in order to better serve the broad remedial purposes of the Act.[83] Technical barriers in a litigant's pathway are a fortiori inappropriately applied in a statutory scheme where laymen, unaided by erudite legal counsel, initiate the EEOC's dispute resolution processes.[84]

The instant court's sophistic reasoning might have been better buoyed. As noted previously, *Johnson* did not rest upon a strained application of *The Harrisburg*, but rather elaborated a general approach applicable also to the instant case. The Court in *Johnson* inquired (1) whether the limitation period was derived from state or federal statutes; (2) whether there existed a substantial federal policy demanding protection; and (3) whether separate and independent causes of action were alleged.[85] Applying this analysis to the facts of *Guy*,

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[80] *See* notes 55 through 70 and accompanying text *supra*. Judge Weick, who authored the majority opinion in *Guy*, also delivered the subsequently reversed Sixth Circuit opinion in *Burnett*. Both opinions rely on the *Harrisburg* logic, which the Supreme Court directly held inapplicable in this context in *Burnett*. Burnett v. New York Cent. R.R., 380 U.S. 424, 427 n.2 (1965). *American Pipe* and *Burnett* were not discredited in *Johnson*. The Court instead distinguished the two cases on their facts. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 466-67 (1975).

[81] Burnett v. New York Cent. R.R., 380 U.S. 424, 426 (1965); Midstate Horticultural Co. v. Pennsylvania R.R., 320 U.S. 356, 360 (1943). The Court noted in *Burnett*:

> In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of rights given under the Act.

Burnett v. New York Cent. R.R., 380 U.S. 424, 427 (1965).

[82] Title VII embodies an expressed congressional preference for initial resort to a nonjudicial forum which does not require the aggrieved party to undergo the burden of obtaining the assistance of legal counsel. Under section 1981 the aggrieved employee is not granted the benefit of the nonjudicial efforts of an administrative agency.

[83] *See, e.g.*, Reeb. v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975); cases cited note 79 *supra*.

[84] Love v. Pullman Co., 404 U.S. 522, 527 (1972).

[85] Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463 (1975).

since Title VII provides its own federal filing period,[86] and since Congress professes an intention that the courts should liberally construe Title VII to prevent acts of discrimination from escaping the reach of the law through a procedural oversight, *Guy* arguably meets the first two parts of the *Johnson* test.[87] The third part is more difficult to satisfy because *Alexander* established that all employment discrimination remedies are "separate, distinct and independent" causes of action. Even applying the *Johnson* test, strict use of the Court's holding in *Alexander* might preclude tolling in the instant case. A substantial identity of causes, sufficient to notify a defendant of the substance of the claim against him would be deemed inadequate. Instead, the Court may require a rigid "complete identity of causes."[88]

Arguably a decision not to toll will have a de minimis effect from a policy perspective since litigation by other aggrieved employees will surface to enforce the federal policy against discrimination in employment.[89] The Sixth Circuit's ratio decidendi, however, sweeps broadly, disallowing notions of equity and fair play to temper hard, absolute rules.[90] This course is especially unwholesome in a statutory scheme designed to afford broad remedial relief.

The aggrieved employee may avail himself of a deceptively simple alternative: File the contractual grievance and a Title VII charge concurrently. Neither procedure is significantly burdensome. Despite the simplicity of this solution, objections might be raised that it places too much onus upon an often unknowledgeable employee from whom legal sophistication should not be required. Two additional adverse consequences flow from the multiple filings necessitated by the instant decision. Since the employee automatically will file a Title VII complaint to preserve his cause of action, the EEOC will be forced to proceed with investigation and conciliation efforts potentially made nugatory by a sub-

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[86] 42 U.S.C. § 2000e-5(d)(1970), *as amended*, 42 U.S.C. § 2000e-5(e) (Supp. IV, 1974).

[87] *Johnson* apparently reduces the effectiveness of policy arguments in the instant context, however, since it notes that if employers are engaged in discriminatory conduct, other claimants will vindicate the national policy concerns. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 467 n.13 (1975). Unlike *Johnson*, we deal herein with a relatively short time period during which unscrupulous employers may more easily conceal the discriminatory nature of their actions from an aggrieved employee. *See* Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975).

[88] Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 467-68 n.13 (1975).

[89] The Supreme Court expressly adopted this view in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 467-68 n.13 (1975). A second argument for de minimis effect rests upon the theory that certain violations are deemed "continuing." When a violation is deemed continuing the time period begins to run from the last instance of the proscribed practice rather than when the charging party first became aggrieved. *See, e.g.*, Belt v. Johnson Motor Lines, Inc., 458 F.2d 443, 444-45 (5th Cir. 1972); Cox v. United States Gypsum Co., 409 F.2d 289, 290-91 (7th Cir. 1968). *See also Developments in the Law, supra* note 8, at 1210-12.

[90] If, as *Guy* determined, the 90-day period is absolutely jurisdictional, then an aggrieved employee is without a remedy even when he was induced by the defendant to refrain from filing a charge; or where defendant fraudulently concealed the essence of a discriminatory practice from him.

sequent satisfactory completion of the contractual grievance.[91] The union's interest in representing its members through grievance procedure, long supported by federal policy, may also suffer from a practice of multiple filings. The EEOC's investigative and conciliation procedures operate to invade the union's energetically guarded domain[92]—an interference and expense which easily could be avoided were the employee permitted to test his remedies consecutively, rather than concurrently.

T. Franklin Myers, Jr.
Steven Allen Riley

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[91] Avoidance of wasted effort in the administrative process is better served by affording great deference to an EEOC determination that the charge is timely filed. *Cf.* Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969).

[92] *Cf.* Comment, *Title I of the LMRDA: Rights and Remedies of Union Members with Respect to their Unions*, 11 WILLAMETTE L. J. 258 (1975); Comment, *Restrictions on the Right to Resign: Can a Member's Freedom to "Escape the Union Rule" Be Overcome by Union Boiler Plate?*, 42 GEO. WASH. L. REV. 397 (1974).

TRUTH IN LENDING—STANDING—STATUTORY RECOVERY AVAILABLE DESPITE ABSENCE OF ACTUAL INJURY SINCE STATUTE DEFINES INJURY IN FACT

Alan White brought suit under the Truth in Lending Act[1] against Arlen Realty and Development Corporation, owner of Korvettes Department stores. White alleged that Korvettes had violated the Act's disclosure requirements[2] by failing to identify adequately goods he had purchased on credit.[3] Although White was not misled by Korvettes' omission, he sought the statutory minimum penalty of $100 for each violation plus costs and attorneys' fees.[4] The United States District Court for the District of Maryland denied relief, holding that since White had suffered no injury, he had no standing to sue under the Act, and that Korvettes' identification of the merchandise was sufficient.[5] On appeal to the United States Court of Appeals for the Fourth Circuit, *held*, reversed. Recovery in a private civil action under the Truth in Lending Act does not depend upon plaintiff's proof of deception or imposition of finance charges. Instead, failure to comply strictly with the identification provisions creates sufficient injury in fact, and plaintiff has standing to prosecute the action. *White v. Arlen Realty & Development Corp.*, No. 74-1890 (4th Cir., Dec. 11, 1975; supplemental opinion, Feb. 17, 1976).

The Truth in Lending Act[6] was the United States Congress' first compre-

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[1] 15 U.S.C. §§ 1601-65 (1970), *as amended*, §§ 1601-66 (Supp. IV, 1974).

[2] 15 U.S.C. § 1637(b)(2) (1970) *as amended*, (Supp. IV, 1974).

[3] The twelve transactions involved here included purchases by plaintiff or his wife of clothing, slide projector trays, photographic prints, light bulbs, phonographic records and toys. The clothing was identified on the charge slips as 'Apparel' and the other purchases were identified as 'Hard Goods'.

White v. Arlen Realty & Dev. Corp., 374 F. Supp. 151, 159 (D. Md. 1974). Judge Craven, for the United States Court of Appeals for the Fourth Circuit, characterized the store's description as "no identifying description at all." White v. Arlen Realty & Dev. Corp., No. 74-1890 (4th Cir., Dec. 11, 1975; supplemental opinion, Feb. 17, 1976).

[4] 15 U.S.C. § 1640(a)(1) (1970), *as amended*, 15 U.S.C. § 1640(a)(2)(A) (Supp. IV, 1974). In a supplemental opinion filed February 19, 1976, following a petition for rehearing, the court reduced the award to conform to amended section 1640(g). 15 U.S.C. § 1640(g) (Supp. IV, 1974). Under section 1640(g) plaintiff can now claim only one violation when there exist multiple failures to disclose the required information in connection with a single transaction. Judge Boreman reserved the right to file a dissenting opinion.

[5] White v. Arlen Realty & Dev. Corp., 374 F. Supp. 151 (D. Md. 1974). The district court found that White, an attorney, had candidly admitted that "[h]is dissatisfaction with the identifying language used at Korvettes . . . had little to do with the filing of [this] . . . suit." *Id.* at 160. The district court also found that:

> [P]laintiff in fact knew what these purchases were at the time he paid the bills in question. In each instance he was able to connect the bill with the purchase and in each instance he decided to pay promptly the amount billed . . . . Plaintiff made no complaint to nor claim against defendant concerning the inadequacy of the identifying language in question until after a dispute arose as to the handling of his orders [at a later date] . . . .

Id. (footnote omitted).

[6] 15 U.S.C. §§ 1601-65 (1970), *as amended*, §§ 1601-66 (Supp. IV, 1974). The Truth

hensive response to the problems of consumer credit. Its enactment, in 1969, followed years of hearings and investigations which revealed widespread, uninformed use of consumer credit.[7] Prior to the Act's passage, consumer credit arrangements were regulated by the states through interest ceilings and usury laws.[8] As a result, credit terms and costs were disclosed to the consumer in a variety of ways which made credit shopping impractical. The express purpose of the Truth in Lending Act was to enable informed decisions on the use of credit by requiring disclosure of terms and rates.[9] The Act, however, does not purport to dictate finance charges.[10]

The Act's provisions cover open ended account credit transactions[11] as well

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in Lending Act is title I of the Consumer Credit Protection Act. 15 U.S.C. §§ 1601-81(t) (1970), *as amended*, §§ 1601-91(e) (Supp. IV, 1974).

[7] From 1945 to 1967, the growth of consumer credit was at a rate four and one-half times greater than the growth rate of the economy as a whole. At the end of 1945, consumer credit amounted to $5.6 billion. By September 1967, the total consumer credit had jumped to $95,886 billion, an increase of over 17 times. H.R. REP. No. 1040, 90th Cong., 1st Sess. 10-11 (1967).

The failure of the average consumer to accurately estimate his annual finance charge resulted from billing practices aimed at getting around state usury statutes. The devices originally used to get around these statutes have now become embedded in industry practice and "no one segment can afford to reform itself . . . ." by disclosing the simple annual rate without incurring a competitive disadvantage. S. REP. No. 392, 90th Cong., 1st Sess. 3 (1967).

> The truth-in-lending provisions of H.R. 11601 are designed to meet this problem. Their most important feature, the requirement to state the finance charge as an annual percentage rate . . . will provide for uniform disclosure of finance charges for the first time in this Nation's history.

Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Finance, 90th Cong., 1st Sess., pt. 1, at 76 (1967).

[8] *See generally* B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION (1966).

> Legislation relating exclusively to one or more aspects of consumer credit is in force in every state. . . . In general, the regulation of [consumer] credit reflects the process by which statutory exceptions were made to interest and usury statutes.

Id. at 15.

[9] The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. This informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1601 (1970), *as amended*, (Supp. IV, 1974).

[10] Although the Act regulates the determination of the finance charge and annual percentage rate, 15 U.S.C. §§ 1605, 1606 (1970), it does not fix specific charges and rates.

[11] 15 U.S.C. § 1602(i) (1970), *as amended*, (Supp. IV, 1974) (defines open ended credit plans).

as loans and credit purchases.[12] The provisions relative to open ended account transactions require that the creditor disclose, before any account is opened, (1) the conditions under which a finance charge may be imposed, (2) the method of determining the amount of finance charge, (3) the balance to which the charge will apply, and (4) any conditions under which other charges may be imposed or under which the creditor may retain or acquire a security interest in the property financed.[13] In addition to disclosures required before the account is opened, the Act requires creditors to disclose, for each billing cycle, the outstanding balance, the amount and date of each credit extension during the period, and a brief identification of any goods purchased.[14]

Congress provided three means to enforce these disclosure requirements: administrative agencies,[15] the Attorney General,[16] and private consumers.[17] The Federal Trade Commission was given overall enforcement responsibility.[18] The

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[12] 15 U.S.C. § 1602(g)(i) (1970), *as amended*, (Supp. IV, 1974) (defines credit arrangements other than open ended).

[13] 15 U.S.C. § 1637(a) (Supp. IV, 1974), *amending* 15 U.S.C. § 1637(a) (1970). The creditor may elect, without disclosure, to impose no finance charge if payment is received after expiration of the time initially stipulated as finance charge free. 15 U.S.C. § 1637(a)(1) (Supp. IV, 1974), *amending* 15 U.S.C. § 1637(a)(1) (1970). If more than one rate is used to compute finance charges, each rate must be disclosed. 15 U.S.C. § 1637(a)(4) (1970), *as amended*, (Supp. IV, 1974).

[14] 15 U.S.C. § 1637(b) (Supp. IV, 1974), *amending* 15 U.S.C. § 1637(b) (1970). Though the Act previously required a brief identification of the goods or services purchased, that section now requires that the identification be

> in a form prescribed by regulations of the Board [of Governors of the Federal Reserve System] sufficient to enable the obligor to identify the transaction, or relate it to copies of sales vouchers or similar instruments previously furnished.

15 U.S.C. § 1637(b)(2) (Supp. IV, 1974). The instant case arose under the previous version of the provision; "a brief description" of the goods was required. Had the present version been in effect, the amended language would seem to require a different result in the instant case. *See* text accompanying note 39 *infra*.

Additionally, each statement must contain the total amount credited to the account during the period covered by the statement, any minimum charges or finance charges added, and if more than one rate is used to compute the finance charge, the rate, the balances to which it was applied, and the annual percentage rate. If the total finance charge exceeds a rate which would equal 50 cents monthly, it must be expressed as an annual percentage rate. The statement must also disclose the balance to which a charge was applied and how the balance was determined. "If the balance is determined without first deducting all credits during the period, that fact and the amount of such payments shall also be disclosed." The statement must reflect the outstanding balance at the end of the billing period and any date within which payment may be made without paying a finance charge. Finally, the creditor must give his address for receiving billing inquiries. 15 U.S.C. § 1637(b)(1)-(11) (Supp. IV, 1974), *amending* 15 U.S.C. § 1637(b)(1)-(10) (1970).

[15] 15 U.S.C. § 1607(a)-(d) (1970), *as amended*, (Supp. IV, 1974).

[16] 15 U.S.C. § 1611 (1970) (imposing criminal liability for willful and knowing violations of the Act).

[17] *See* 15 U.S.C. § 1640 (1970), *as amended*, (Supp. IV, 1974).

[18] 15 U.S.C. § 1607(c) (1970).

Attorney General was also authorized to institute criminal actions against willful violators who could be fined and imprisoned upon conviction.[19] As a final method of enforcing disclosure requirements, the private consumer was given the remedies of rescission[20] or an action for damages[21] against an offending creditor. Among the various means of enforcement, the private civil action was intended to be the dominant method for inducing compliance with the Act.[22] Under this provision, a debtor may recover from a noncomplying creditor any damages suffered plus twice the finance charge, with a minimum recovery of $100 and a maximum of $1000 per violation, including a discretionary award of costs and attorneys' fees.[23] A creditor can insulate himself from civil liability, however, by discovering any error and notifying the debtor within 15 days while making adjustments which ensure that the debtor will not have to pay an excessive finance charge.[24] These actions must be taken before the debtor notifies the creditor or files suit.[25] The creditor also may defend the civil action by showing that the violation was inintentional, resulting from a bona fide error, and that he had maintained procedures reasonably adapted to avoid such errors.[26] This defense, however, has been construed to afford protection only for "clerical errors."[27]

The Truth in Lending Act has been vigorously enforced through private civil actions largely because technical violations,[28] irrespective of actual injury, have been sufficient to grant standing. It is generally accepted that Congress can create statutory rights and define the class for whose benefit the rights exist.[29]

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[19] 15 U.S.C. § 1611 (1970).

[20] 15 U.S.C. § 1635 (Supp. IV, 1974), *amending* 15 U.S.C. § 1635 (1970).

[21] 15 U.S.C. § 1640 (Supp. IV, 1974), *amending* 15 U.S.C. § 1640 (1970).

[22] *See* Fischer, *From Ratner to Qui Tam: Truth-in-Lending Class Action Developments*, 24 HAST. L.J. 813 (1973); Kintner, Henneberger, and Neill, *A Primer on Truth in Lending*, 13 ST. LOUIS U.L.J. 501, 541 (1969); Comment, *Truth in Lending, The Impossible Dream*, 22 CASE W. RES. L. REV. 89, 106 (1970).

[23] 15 U.S.C. § 1640(a) (Supp. IV, 1974), *amending* 15 U.S.C. § 1640(a) (1970). The amended section, which became effective on October 28, 1974, contains a special damage provision for class action suits. There is no minimum recovery for individual members of the class and the total award can not be greater than $100,000 or 1 percent of the creditor's net worth. *Id.* § 1640(a)(2)(B). Evidently these limitations do not include the awards possible for costs and attorneys' fees. This amendment presumably resulted from the threat Truth in Lending class actions posed to the solvency of even large corporations.

[24] 15 U.S.C. § 1640(b) (Supp. IV, 1974), *amending* 15 U.S.C. § 1640(b) (1970).

[25] 15 U.S.C. § 1640(b) (Supp. IV, 1974), *amending* 15 U.S.C. § 1640(b) (1970).

[26] 15 U.S.C. § 1640(c) (Supp. IV, 1974), *amending* 15 U.S.C. § 1640(c) (1970).

[27] *See* Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971). The creditor must also show that due care has been taken to avoid such errors. *Id.* at 281.

[28] *See, e.g.*, Ives v. W.T. Grant Co., 522 F.2d 749 (2d Cir. 1975) (use of the term "amount financed" instead of "unpaid balance" held violation); Garza v. Chicago Health Club, 347 F. Supp. 955 (N.D. Ill. 1972) (acceleration clause triggering an interest rebate must be disclosed as a "default charge").

[29] *See* Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968); FCC v. Sanders Bros. Radio

The federal courts also have been quite willing to expand the protected class to include those who are only incidentally injured by a statutory violation.[30] Only recently, however, have the courts been willing to allow a statutory violation by itself to be conclusive of injury. The concept of legislatively defined injury apparently began in a concurring opinion of Mr. Justice White in *Trafficante v. Metropolitan Life Insurance Co.*,[31] where it was implied that a statutory violation alone would confer standing under the Civil Rights Act of 1968.[32] This concurrence was relied upon by Mr. Justice Marshall writing for the majority in *Linda R.S. v. Richard D.*,[33] stating in dictum that "Congress may enact statutes creating legal rights the invasion of which creates standing, even though no injury would exist without the statute."[34] Under this reasoning Congress may create or define injury merely by establishing a legal right and identifying the class of persons entitled to its protection. Through the Truth in Lending Act Congress has created a legal right to disclosures, the violation of which is a legislatively defined injury despite the absence of any "actual" harm to the consumer. This position was taken by the United States District Court for the Southern District of New York in *Ratner v. Chemical Bank New York Trust Co.*,[35] where the court rejected defendant's argument that a plaintiff who was not deceived and who incurred no finance charge should not be allowed to recover the statutory penalty.[36] The reasoning in *Ratner* was implicitly upheld

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Station, 309 U.S. 470 (1939).

[30] *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975); Linda R.S. v. Richard D., 410 U.S. 614 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (congressional purpose controlling).

[31] 409 U.S. 205 (1972).

[32] The Court held that the Civil Rights Act of 1968 was intended by Congress to protect tenants of segregated housing from the lost benefits of living in an integrated neighborhood. Although the plaintiffs themselves were not discriminated against, the Court allowed them standing because of the indirect injury described. In concurrence, Mr. Justice White said:

> Absent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioners' complaint in this case presented a case or controversy within the jurisdiction of the District Court under Art. III of the Constitution.

409 U.S. at 212.

[33] 410 U.S. 614 (1972).

[34] *Id.* at 617 n.3.

[35] 329 F. Supp. 270 (S.D.N.Y. 1971). In *Ratner*, the plaintiff brought suit against a bank under the civil liability section of the Truth in Lending Act, alleging that the defendant bank had failed to make proper disclosure of the annual percentage rate as required under the open end credit plan provision. The bank moved for dismissal, asserting that no finance charge had been imposed. It further maintained that the Act required disclosure only to persons upon whom a finance charge is or may be imposed.

The court rejected this argument, holding that the imposition of a finance charge in credit transactions is irrelevant in establishing liability for failure to disclose. The court concluded that the basis for liability under the civil liability section is the failure to disclose the required information and not the presence of a finance charge. *Id.* at 280.

[36] *Id.* at 280.

in *Mourning v. Family Publications Service, Inc.*,[37] where the United States Supreme Court held that the Act permitted imposition of penalties for nondisclosure regardless of the fact that no finance charge was actually imposed.[38]

In the instant case, the court found that the designations on the defendant's billing slips were insufficient to satisfy the Act's requirements of a brief identification, adding that plaintiff's failure to be deceived was irrelevant to his right to recovery.[39] The court found that since Congress had intended to rely upon private litigants to enforce the Act, a "species of private attorney[s] general" had been created with standing to pursue any violation.[40] The court noted that Congress did not pass the Truth in Lending Act merely to impose a general duty of adequate disclosure upon creditors. "Rather, Congress gave the debtor a right to specific information and therefore defined injury in fact as the failure to disclose such information."[41]

The purpose of the Truth in Lending Act is to promote the informed use of credit by requiring its costs and terms to be disclosed.[42] Yet the Act's provisions and the judicial policy illustrated in *Arlen Realty* may frustrate this purpose by reducing the open account credit which small businesses are presently willing to make available to customers.[43] Most small retail merchants will no doubt plow along unaware of these complex government regulations. The danger lies, of course, in the possibility that any of these small merchants could be "caught" in a violation, forcing defense of an expensive law suit, or worse, the discontinuance of open account credit practices. Since the extent of the use of consumer credit in our society has developed past the point of recall, larger businesses must bear, and pass along, the added expense of compliance. Overall, Congress has probably correctly balanced the competing interests, but the judicial wisdom of activating the full remedial force of the Act upon unintentional or technical violations is questionable. It is unfortunate that the unintentional violation

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[37] 411 U.S. 356 (1973). The United States Supreme Court affirmed the *Ranter* policy analysis and concluded that the Act imposes a disclosure requirement on all members of a defined class of creditors in order to discourage evasion of the requirements by a substantial portion of that class. *Id.* at 374.

[38] *Id.* at 376.

[39] White v. Arlen Realty & Dev. Corp., No. 74-1890 (4th Cir. , Dec. 11, 1975; supplemental opinion, Feb. 17, 1976).

[40] *Id.*

[41] *Id.*

[42] 15 U.S.C. § 1601 (1970), *as amended*, (Supp. IV, 1974).

[43] *See generally* Rumsey, *Truth-in-Lending: Congress Reacts to the Creditors' Dilemma*, 24 EMORY L.J. 379 (1975). According to Rumsey, the confusion created by judicial interpretation of the Act has also frustrated its expressed purpose.

> The purpose has been defeated because the simplicity and clarity, which are within the very texture of meaningful disclosure, have been submerged in an endless search for new and varied statutory duties. Such constant upheaval, by detracting from the uniform prominence of important disclosures and requiring continual revision of disclosure forms, has in fact stifled consumer attempts to become familiar with the "various credit terms available."

Id. at 381 (footnote omitted).

defense has been "read out" of the statute by the courts[44] and that no provision exists in the statute to curb suits motivated, as in the instant case, by a desire to vindicate a grudge against a retailer.[45]

The 1974 amendments to the Act operate somewhat to restore a proper balance. A maximum class action recovery was established. There is no minimum recovery for individual members of the class, and the total recovery is limited to the lesser of $100,000 or 1 percent of the creditor's net worth.[46] In response to a particularly shocking case,[47] section 1640 was amended to protect the creditor who complies in good faith with interpretations of the Federal Reserve Board.[48] Multiple failures to disclose the required information in connection with a single transaction now constitute but one violation.[49] Creditors in open end consumer credit plans may avoid disclosures relating to imposition of additional finance charges if they choose not to impose such a charge.[50] Of particular relevance to the instant case, the 1974 amendments altered the provision previously requiring a brief description of the goods in open end credit plans.[51] That subsection now requires only a

> brief identification . . . in a form prescribed by regulations of the Board sufficient to enable the obligor to identify the transaction, or relate it to copies of sales vouchers or similar instruments previously furnished.[52]

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[44] *See* Starks v. Orleans Motors, Inc., 372 F. Supp. 928 (E.D. La. 1974) (defense of unintentional error unavailable except where clerical errors made); *accord*, Palmer v. Wilson, 359 F. Supp. 1099 (N.D. Cal. 1973); Buford v. American Fin. Co., 333 F. Supp. 1283 (N.D. Ga. 1971); Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971). It should be noted that the unintentional error defense *is* recognized under the criminal sections of the Act (15 U.S.C. § 1611 (1970), *as amended*, (Supp. IV, 1974)). Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270, 281 (S.D.N.Y. 1971).

[45] *See* note 5 and accompanying text *supra*.

[46] 15 U.S.C. § 1640(a)(1)(B) (Supp. IV, 1974), *amending* 15 U.S.C. § 1640(a) (1970).

[47] Bone v. Hibernia Bank, CCH Consumer Credit Guide ¶ 99,025 (N.D. Cal. 1972), *modified*, 354 F. Supp. 310 (N.D. Cal. 1973), *rev'd*, 493 F.2d 135 (9th Cir. 1974). In *Bone*, the plaintiff accused a lending bank of failure to disclose its method for computing rebates for prepayment. In defense, the bank pointed out that its disclosure forms were based upon examples provided by the Federal Reserve Board in its publication *What You Ought To Know About Truth in Lending*. The bank also had obtained unofficial letters from an assistant Board director approving its disclosure forms. The district court held for the consumer since Federal Reserve Board publications lacked the force of law. The circuit court reversed holding that

> [g]reat deference is especially due the Federal Reserve Board's construction of its own Regulation Z because of the important interpretive and enforcement powers granted this agency by Congress under the Truth in Lending Act.

493 F.2d at 139 (citations omitted).

[48] 15 U.S.C. § 1640(f) (Supp. IV, 1974), *amending* 15 U.S.C. § 1640 (1970).

[49] 15 U.S.C. § 1640(g) (Supp. IV, 1974), *amending* 15 U.S.C. § 1640 (1970).

[50] 15 U.S.C. § 1637(a)(1) (Supp. IV, 1974), *amending* 15 U.S.C. § 1637(a)(1) (1970).

[51] 15 U.S.C. § 1637(b)(2) (Supp. IV, 1974), *amending* 15 U.S.C. § 1637(b)(2) (1970).

[52] 15 U.S.C. § 1637(b)(2) (Supp. IV, 1974), *amending* 15 U.S.C. § 1637(b)(2) (1970).

The amendment thus relaxes the requirement for description. Although the 1974 amendments alleviate, in selected fashion, a creditor's exposure to liability under the Truth in Lending Act, continued harsh judicial application of an already technically worded statute may change the old maxim of "caveat emptor" to "caveat vendor."

Nancy Harrelson

BOOK REVIEWS

Evidence and the Trial Lawyer

Edited by Elliott H. Pollack, Alan L. Locke, and David J. Sargent. Cambridge, Mass.: The Association of Trial Lawyers of America. 1975. Pp. 576. $35.00.

*Thomas R. Mason**

This volume is a compilation of selected articles about various evidentiary topics. The form is promising: a no-nonsense, practical vinyl covering that will wear well through the buffeting of brief cases, airlines, counsel tables, motel rooms, and libraries. The looseleaf binding allows easy updating, insertion of personal additions, and simple extraction in order to hand the decisive page to the judge or to make additional copies. Tab organization permits immediate reference to the major topics: "The Federal Rules of Evidence," "Judicial Notice," "Witnesses: Lay and Expert," "Photographs and Other Demonstrative Evidence," and so forth.

The title creates a presumption of a well organized, superbly indexed, complete overview of the law of evidence. The trial lawyer envisions reaching for this volume, his quick reference work, the handy casefinder coming to his aid time and again in trial, negotiation, and preparation.

The bubble bursts inside. There is no index to aid the trial lawyer in finding the point, much less the case he needs. The text is composed of reprints of 25 items, beginning with a photocopy of Public Law 93-595, the Federal Rules of Evidence.

If the book has a general purpose, it is to present a compilation of articles written about the "proposed" Federal Rules of Evidence. Fourteen of the articles focus on these. The Editors Note recognizes that the articles were written before the Federal Rules were enacted but suggests that they remain of value, since the "rules" were passed in much the same form as when reviewed in the articles. A good point, but why then include articles analyzing the Rules of Privileges, as proposed, when those rules were completely excised?

The articles were "borrowed" from various sources; many law reviews, the Journal of the American Bar Association, Trial Magazine, the Federal Bar Journal, the Trial Lawyers Quarterly. Of unusual note is the credit at page 71, "Copyright 1974 by the American Law Institute. Reprinted with the permission of THE PRACTICAL ALWYER [sic], . . . A TRIAL ALWYER [sic] SPEAKS TO THE INVESTIGATOR."

The compilation contains some excellent articles which are very instructive such as, *Basic Rules of Relevancy in the Proposed Federal Rules of Evidence*, Weinstein & Berger, reprinted from 4 *Georgia Law Review* 43. Others are only

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interesting: *Triangulating Hearsay*, Laurence Tribe, reprinted from 87 *Harvard Law Review* 957. Too many of the articles are academic, citing other journal articles or treatises for the most part, or too personal, expressing ideas or views of the author but citing little useful authority.

If many trial judges have begun paying much attention to journal articles dealing with evidence written in other jurisdictions, that will be news. Several of the articles in this volume may be useful in appellate briefs, but the value of the volume in trial practice is hard to perceive. Caution is urged from responding positively to the promising title.

Jury Woman

By Mary Timothy
Palo Alto, Cal.: Glide Publications and Emty Press. 1975.
Pp. 276. $4.95.

*Betty A. Morgan**

Jury Woman's chant—"power to the Jury"—is a plea for reform of the jury system. Ms. Timothy uses her experiences as a juror in the Angela Davis trial to demonstrate how the jury selection process can prevent trial by a jury of one's peers and how the psychological manipulation of jurors by attorneys and judges can prevent the jury from rendering an intelligent, impartial judgment.

Ms. Timothy attributes some flaws in the jury selection process to attorneys who use peremptory challenges, extensive investigation, or analytical techniques, such as those used in the John Mitchell, Maurice Stans trial, to control the composition of the jury. The author argues that inequities are implicit in any system which imposes restrictions, such as sequestration, thereby depriving a juror of his constitutional rights of free movement and of association. Ms. Timothy suspects that during the trial her telephone was tapped and every member of her family was investigated by the government before she was accepted as a juror. The author argues that exercising these types of tactics "could have more effect on the judgment of the jurors than any reading of papers or listening to the radio or television."[1] Ms. Timothy also criticises the jury system because jurors are not informed of their rights. A juror does not know if it is permissible to take notes at trial or to ask questions during the proceedings; nor is the juror advised on workable procedures for jury deliberation.

Ms. Timothy concludes that under the present jury system the government's extensive investigation of prospective jurors could evolve into a system where dossiers are compiled on all citizens. Such restraints on a juror's liberties might "result in the jury becoming merely an extension of the court, instead of a citizen jury that can stand between the accused and the accuser."[2] To circumvent the degeneration of the jury system, the author offers a 9 point proposal for reform of that system:[3]

1. Jurors should have the right to adequate financial remuneration.
2. Jurors should be fully informed of the "rules of the game" before the trial commences.
3. Jurors should have the right to make individual, independent judgments.
4. Jurors should have the right to serve on juries which include people from varied socioeconomic groups.
5. Jurors should have the right to have members of minorities included on the jury.

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* Staff Member, *Mississippi Law Journal.*

[1] M. Timothy, Jury Woman 81 (1975).

[2] *Id.* at 276.

[3] *Id.* at 268-75.

6. Jurors should have the right not to be stereotyped.
7. Jurors should have the right to greater privacy.
8. Jurors should have the right to be free from threats, both direct and implied.
9. Jurors should have the right to be free from investigation.

Ms. Timothy, in her criticism of the jury system, failed to recognize that she was manipulated by our psuedo-liberal culture. Viewing Angela Davis as a woman—a Black woman, subjected to constant discrimination—Ms. Timothy concluded that a woman of Angela Davis' experience and background would not be so stupid as to involve herself in prisoners' escape attempts. Apparently after Ms. Timothy resolved that Angela Davis could not have committed the crimes, she examined the evidence to see if her assumption was correct.

Besides familiarizing potential jurors with trial procedures, *Jury Woman* illuminates the conditioning process by which biases are pressed upon jury members. Moreover, this book offers attorneys a valuable insight into a juror's perceptions of the adversary system. The observations and suggestions that Ms. Timothy presents could aid the trial practitioner gain a better understanding of the thought processes of jurors on Ms. Timothy's socio-economic and educational level and its potential effect on a jury's determination of the facts.

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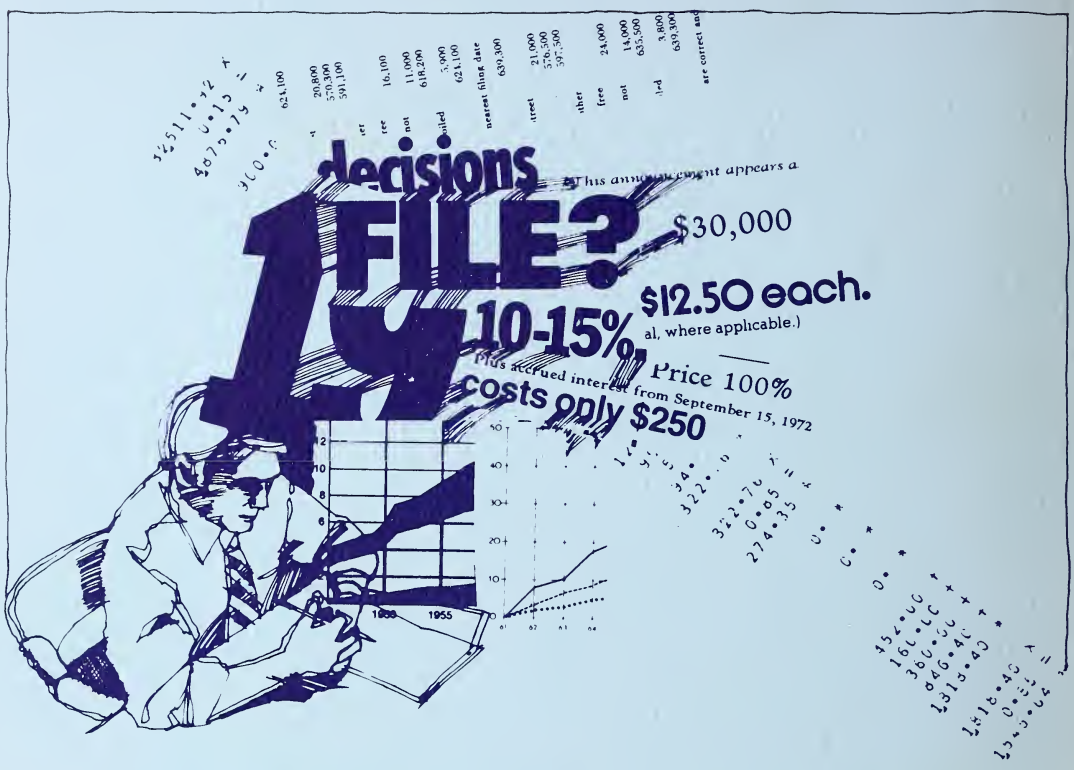
AND WITH OVER $83,000,000 IN ASSETS WE ARE BETTER ABLE TO SERVE THE NEEDS OF YOUR CLIENTS THROUGHOUT NORTH MISSISSIPPI WITH FIRST MORTGAGE HOME AND COMMERCIAL REAL ESTATE LOANS OR AS A LEGAL DEPOSITORY FOR ESTATES, GUARDIANSHIPS, AND TRUST FUNDS.

Offices in

Booneville * Clarksdale * Cleveland
Grenada * Hernando * Horn Lake
Houston * New Albany * Oxford * Ponotoc
Ripley * Senatobia * Starkville

North Mississippi Savings & Loan Assoc.



Freedom From Financial Worry

That's one of the most important services you can provide your client. In fact, it's what your client really looks to you for.

It's our business, too. Our Trust Department offers sound, professional financial counseling on such matters as retirement plans, estate planning, investment management and other fiduciary services.

These are some of the ways we can work with you and others to provide total estate planning that will free your client from financial worry.

Put your client's trust in us!

First National Bank
Jackson, Mississippi Member FDIC

BRANCHES: Amite County Bank, Gloster/Liberty;
Commercial National Bank, Greenville/Leland; First National Bank, McComb;
The Bank of Greenwood, Greenwood; Tylertown Bank, Tylertown